TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

[redacted]

No. 34

EDISON'S JOHNSON STORAGE BATTERY, PLAINTIFF IN ERROR,

vs.

WILLIAM J. BAETH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

FILED MAY 4, 1908.

(28,811)

(29,611)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 327.

ENDICOTT JOHNSON CORPORATION, PLAINTIFF IN ERROR,

vs.

WILLIAM H. SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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[fol. 1] **SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT**

WILLIAM H. SMITH, Plaintiff-Respondent,

vs.

ENDICOTT JOHNSON CORPORATION, Defendant-Appellant.

STATEMENT UNDER RULE 234

This action was commenced on the 23d day of July, 1920 by service of summons and complaint upon the defendant. The defendant's answer was served on the 12th day of August, 1920.

The names of the original parties are as stated in the title above. No change of parties has taken place pending the suit.

[fol. 2] NEW YORK SUPREME COURT

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

Please take notice, That the defendant, Endicott Johnson Corporation, hereby appeals to the Appellate Division of the New York Supreme Court in and for the Third Department from the judgment entered in the above entitled action in favor of the above named plaintiff and against the above named defendant for the sum of Two Hundred Seventeen Dollars and Twenty-five Cents ($217.25) in the Office of the Clerk of the County of Broome on the twenty-third day of July, 1921 and also from the Findings of Fact and Conclusions of Law of the Hon. George McCann, one of the justices of this Court, dated July 18, 1921 and particularly from the Findings of Fact in the three respective Causes of Action herein as follows:

First Cause of Action

That portion of Finding of Fact numbered 1, which states by implication that the defendant was a corporation prior to March 31, 1919.

Findings of Fact numbered 11 and 15.

That portion of Finding of Fact numbered 16, which states that [fol. 3] plaintiff was the true and lawful owner and holder of the rights and interests alleged to have been transferred.

Second Cause of Action

That portion of Finding of Fact numbered 1, which states by implication that the defendant was a corporation prior to March 31, 1919.

That portion of Finding of Fact numbered 6 which states that the said Bert L. Lindsley earned and received more than $12.00 per week during each week from February 15, 1920 to July 24, 1920.

Findings of Fact numbered 10 and 14.

That portion of Finding of Fact numbered 15 which states that the plaintiff is the true and lawful owner and holder of rights alleged to have been assigned.

Third Cause of Action

That portion of Finding of Fact numbered 1 which states by implication that Endicott Johnson Corporation was a corporation prior to March 31, 1919.

Findings of Fact numbered 10 and 14.

And from Conclusions of Law numbered 1, 2 and 3, in their entirety.

Dated the nineteenth day of August, 1921.

Yours, etc. Maurice E. Page, Attorney for Defendant-Appellant.

To the Clerk of the County of Broome and Moe Goldstein, Attorney for Plaintiff-Respondent.

[fol. 4] NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

SUMMONS

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated July 22nd 1920.

Moe Goldstein, Plaintiff's Attorney, Office and Post Office Address, No. — Security Mutual Life Bldg., Binghamton, N. Y.

[fol. 5] NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

COMPLAINT

Plaintiff for his complaint herein alleges, upon information and belief as follows:

For a First Cause of Action

1. That at all the times hereinafter mentioned the defendant was a domestic corporation.

2. That at all the times hereinafter mentioned one H. L. Hart, Esq. was a City Judge, in and for the City of Binghamton, Broome County, N. Y. duly elected and qualified as such, and that said Judge resides in said City, County and State aforesaid, and by virtue of the laws of the State of New York and the City Charter of the City of Binghamton, N. Y. such Judge had power to hold Court, issue process, and had jurisdiction to hear, try and determine actions on contracts to recover a sum of money only, provided the sum did not exceed the sum of $500.00.

3. That on or about and prior to September 12th, 1918, Fred A. Shaw and Earl Shaw duly commenced an action against Clinton L. Ogden, before said Judge in said City Court of Binghamton at Binghamton, N. Y. and that on or about and prior to said date a summons in said action was duly issued by said City Judge, out of his Court [fol. 6] and duly and personally served upon the said defendant, Clinton L. Odgen, within the City of Binghamton, N. Y. he being the defendant mentioned in said summons, and said summons was made returnable on September 12th, 1918.

4. That such proceedings were thereafter duly had in said action, that on the said 12th day of September 1918 a judgment was duly made and given by said City Judge in favor of Fred A. Shaw and Earl Shaw, the plaintiff in said action, against Clinton L. Ogden, the defendant in said action, for the sum of $32.48, which said judgment was duly entered and docketed by said City Judge according to the laws and practice of the State of New York, and that no part of said judgment has been paid, reversed or set aside.

5. That thereafter and on or about September 18th, 1918, a transcript of said judgment rendered by said City Judge of Binghamton was duly filed and docketed in the Office of the Clerk of the County of Broome, at Binghamton, N. Y., and that on said date an execution upon said judgment against the property of said Clinton L. Ogden was duly issued by said County Clerk out of the County Court of Broome County, N. Y. to the Sheriff of the County of Broome, where said judgment debtor, Clinton L. Ogden resided and still resides, and that the said execution was duly returned wholly unsatisfied and wholly unpaid by said Sheriff.

6. That said Clinton L. Ogden at all the times hereinafter mentioned was and still is employed by the defendant, and that the

wages earnings and salary of said Clinton L. Ogden amount to $12 or more per week, to wit; the sum of $30 and that the same is [fol. 7] paid by the defendant weekly to said Clinton L. Ogden.

7. That thereafter and on or about April 8th 1919 an order was duly made and entered by Hon. Benjamin Baker, Broome County Judge, in the aforesaid action, directing the issuance of an execution against the wages, earnings and salary of the said judgment debtor, Clinton L. Ogden, due and owing to him and to become due and owing to him from the said defendant herein, pursuant to Section 1391, of the Code of Civil Procedure of the State of New York.

8. That thereafter and on or about April 8th 1919, an execution under and pursuant to the aforesaid order of Hon. Benjamin Baker, Broome County Judge, and said Section 1391 of the Code of Civil Procedure was duly issued out of the Court of Broome County, N. Y. to the Sheriff of the County of Broome, N. Y., on the aforesaid judgment mentioned herein in favor of said Fred A. Shaw and Earl Shaw and against Clinton L. Ogden the judgment debtor mentioned in said judgment.

9. That said execution was duly issued against 10% *per centum* of the sum of $30 due and to become due of the said Clinton L. Ogden, judgment debtor, from the wages, earnings and salary he was entitled to receive and did receive from the defendant herein each week during his employ with the defendant, until said judgment with the costs, interests and Sheriff's Fees thereof was entirely satisfied, pursuant to Section 1391 of the Code of Civil Procedure of the State of New York.

[fol. 8] 10. That the sum specified in the said garnishee execution to be paid by the defendant herein on account of same was the sum of $3.00 weekly.

11. That on or about April 12th, 1919, said garnishee execution was duly presented to said defendant herein by the Sheriff of the County of Broome, N. Y. and at the same time a copy of said execution was presented to and delivered personally and left with Elliott Spaulding, an officer thereof.

12. That said execution was a lien and continuing levy upon said wages, earnings and salary of said Clinton L. Ogden, the judgment debtor, since the presentation of said execution, to the defendant herein, and up to and including 29th day of August, 1919 to the extent of 10% thereof, to wit; $3.00 per week.

13. That the defendant wholly failed, neglected, and refused, and still refuses to pay the same or the sum specified in said execution or any part thereof, contrary to the provisions of the Section 1391 of the Code of Civil Procedure; altho' said Clinton L. Ogden still is in the employ of the defendant herein; altho' due demand therefore has been made.

14. That the said execution is still outstanding, and said judgment remains wholly unsatisfied, unpaid and undischarged.

15. That thereafter and before the commencement of this action, the said Earl Shaw and Fred A. Shaw, duly assigned, transferred

and set over their right, title and interest in and to said judgment and execution hereinbefore mentioned, and their rights pursuant to Section 1391 of the Code of Civil Procedure of the State of New [fol. 9] York, to the plaintiff herein, who is now the true and lawful holder thereof.

For a Second Cause of Action

1. That at all the times hereinafter mentioned the defendant was and still is a domestic corporation.

2. That at all the times hereinafter mentioned one W. F. Ingerson, Esq. was a Justice of the Peace in and for the Town of Union, Broome County, N. Y. duly elected and qualified as such, and that said Justice resides in the said Town of Union and by virtue of the laws of the State of New York, such Justice had power to hold Court, issue process, and had jurisdiction to hear, try and determine actions on contract to recover a sum of money only provided the sum demanded did not exceed the sum of $200.00.

3. That on or about the 29th day of November, 1919 one Oscar M. Austin duly commenced an action against Bert L. Lindsley before said Justice, in Justices' Court, Town of Union, at Johnson City, N. Y. and that on or about November 29th, 1919 the summons in said action was duly issued by said Justice out of his said Court and duly and personally served upon the said defendant therein, Bert E. Lindsley within the Town of Union, the defendant named in the said summons, and said summons was made returnable December 10th, 1919.

4. That such proceedings were thereafter duly had in said action that on the said December 10th 1919 judgment was duly made and given by the said Justice of the Peace in favor of said Oscar M. Aus- [fol. 10] tin, the plaintiff in said action, for the sum of $26.45, damages and interest, plus costs which said judgment was duly docketed by said Justice of the Peace, according to the law and practice of the State of New York, and that no part of said judgment has been paid.

5. That thereafter and on about December 17th, 1919, a transcript of said judgment was rendered by said Justice of the Peace, and was duly filed and docketed in the office of the Clerk of the County of Broome, at Binghamton, N. Y. on said day, and that on said day an execution upon said judgment against the property of said Bert L. Lindsley was duly issued by the County Clerk of the County of Broome, to the Sheriff of the County of Broome, where said judgment debtor, Bert E. Lindsley resided and still resides, and that the said execution was duly returned, wholly unsatisfied and wholly unpaid by said Sheriff.

6. That said Bert E. Lindsley, at all of the times hereinafter mentioned was and still is employed by the defendant at its Johnson City factory and that the wages, earnings and salary of said Bert E. Lindsley, amount to $12.00 or more per week, and amounts to

the sum of $30.00 weekly, and that the same are paid by the defendant weekly to said Bert E. Lindsley.

7. That thereafter and on or about February 17th, 1920, an order was duly made by Hon. Benjamin Baker, Broome County Judge in the aforesaid action, directing the issuance of an execution against the wages, earnings and salary of the said judgment debtor, Bert E. Lindsley, due and owing to him from the said defendant herein, pursuant to Section 1391 of the Code of Civil Procedure; and [fol. 11] which order was duly entered in the Broome County Clerk's Office.

8. That on or about February 17th, 1920, an execution under and pursuant to said order of Hon. Benjamin Baker, Broome County Judge and said Section 1391 of the Code of Civil Procedure, was duly issued out of the County Court of Broome County, N. Y. to the Sheriff of the County of Broome, N. Y. on said judgment in favor of the said Oscar M. Austin and against the said judgment debtor, Bert E. Lindsley, before mentioned.

9. That said execution was duly issued against 10% *per centum* of the sum of $30.00 due and to become due to the said Bert E. Lindsley, judgment debtor, from the wages, earnings and salary he was entitled to receive from the defendant each week until said judgment with the costs interest and sheriff's fees thereof was entirely satisfied pursuant to Section 1391 of the Code of Civil Procedure.

10. That the sum specified in the said execution, to be paid by the defendant herein, on account of same was the sum of $3.00 weekly.

11. That on or about February 20th, 1920, said execution was duly presented to the said defendant herein by the Sheriff of the County of Broome, N. Y. and at the same time a copy of said execution was delivered to and left with an officer thereof.

12. That said execution was a lien and continuing levy on said wages, earnings and salary of said Bert E. Lindsley, the judgment debtor, since the presentation of the said execution to the defendant [fol. 12] herein, and up to and including the 12th day of May, 1920 and up — and including the commencement of this action.

13. That thereafter and on or about May 12th, 1920, and since then, the Sheriff of the County of Broome, N. Y. duly demanded of this defendant the sum of $26.45, plus interest and his lawful fees or whatever amount of money has been deducted from the wages, earnings and salary of said Bert E. Lindsley, due from the defendant herein, in accordance with the terms of the said execution.

14. That the said defendant wholly failed, neglected and refused to pay the same or any sums as specified in said execution or any part thereof, contrary to the provisions of Section 1391 of the Code of Civil Procedure; also at the time of the aforesaid demand said Bert E. Lindsley was and still is in the employ of the defendant herein.

15. That the said execution is still outstanding and said judgment remains wholly unsatisfied, unpaid and undischarged; and that no other garnishee execution was outstanding against judgment debtors wages, at all times herein before mentioned.

16. That thereafter and before the commencement of this action, the said Oscar M. Austin duly assigned, transferred and set over his

right, title and interest in and to said judgment and execution hereinbefore mentioned, and all his rights pursuant to Section 1391 of the Code of Civil Procedure of the State of New York, to the plaintiff herein, who is now the true and lawful holder thereof.

[fol. 13] For a Third Cause of Action

1. That at all times hereinafter mentioned the defendant was and still is a domestic corporation.

2. That at all the times hereinafter mentioned, one H. L. Hart, Esq., was a City Judge, in and for the City of Binghamton, Broome County, N. Y. duly elected and qualified as such, and that said Judge resides in said City, County and State aforesaid, and by virtue of the laws of the State of New York, and the City Charter of the City of Binghamton, N. Y. such Judge had power to hold Court, issue process, and had jurisdiction to hear, try and determine actions on contracts to recover a sum of money only, provided the sum did not exceed the sum of $500.00.

3. That on or about and prior to July 19th 1919 the plaintiff herein duly commenced an action against Charles W. Clark, before said Judge in said City Court of Binghamton, at Binghamton, N. Y. and that on or about and prior to said date a summons in said action was duly issued by said City Judge, out of his Court and duly and personally served upon the said defendant herein, Charles W. Clark within the City of Binghamton, N. Y. he being the defendant mentioned in said summons, and said summons was made returnable on July 19th, 1919.

4. That such proceedings were thereafter duly had in said action, that on the said 19th day of July, 1919 a judgment was duly made and given by said City Judge in favor of the plaintiff herein, who was the plaintiff in that action, against Charles W. Clark the defendant in said action, for the sum of $34.40 which said judgment was [fol. 14] duly entered and docketed by said City Judge according to the laws and practice of the State of New York, and that no part of said judgment has been paid, reversed or set aside.

5. That thereafter and on or about August 7th 1919 a transcript of said judgment rendered by said City Judge of Binghamton was duly filed and docketed in the Office of the Clerk of the County of Broome, at Binghamton, N. Y.; and that on said date an execution upon said judgment against the property of said Charles W. Clark, was duly issued by said County Clerk out of the County Court, Broome County, N. Y. to the Sheriff of the County of Broome, where said judgment debtor, Charles W. Clark resided and still resides, and that the said execution was duly returned wholly unsatisfied and wholly unpaid by said Sheriff.

6. That said Charles W. Clark at all the times hereinafter mentioned was and still is employed by the defendant, and that the wages, earnings and salary of said Charles W. Clark amount to $12 or more per week, to wit: the sum of $15 to $18, and that the same are payable by the defendant weekly to said Charles W. Clark.

7. That thereafter and on or about September 22nd, 1919 an order was duly made and entered by Hon. Benjamin Baker, Broome County Judge, in the aforesaid action, directing the issuance of an execution against the wages, earnings and salary of the said judgment debtor, Charles W. Clark in said action, due and owing to him and to become due and owing to him from the said defendant herein, pursuant to section 1391 of the Code of Civil Procedure of the State of New York.

[fol. 15] 8. That thereafter and on or about September 22nd, 1919, an execution under and pursuant to the aforesaid order of Hon. Benjamin Baker, Broome County Judge, and said Section 1391 of the Code of Civil Procedure was duly issued out of the County Court of Broome County, N Y. to the Sheriff of the County of Broome, N. Y. on the aforesaid judgment mentioned herein in favor of the plaintiff herein and against Charles W. Clark the judgment debtor mentioned in said judgment.

9. That said execution was duly issued against 10% *per centum* of the sum of $18 due and to become due of the said Charles W. Clark's wages, earnings and salary he was entitled to receive from the defendant herein each week during his employ with the defendant, until said judgment with the costs, interest and Sheriff's fees thereon was entirely satisfied, pursuant to Section 1391 of the Code of Civil Procedure of the State of New York.

10. That the sum specified in the said garnishee execution to be paid by the defendant herein on account of same was the sum of $1.80 weekly.

11. That on or about September 27th, 1919 said garnishee execution was duly presented to said defendant herein by the Sheriff of the County of Broome, N. Y. and at the same time a copy of said execution was presented to and delivered personally and left with Maurice E. Page, Esq. an officer thereof.

12. That said execution was a lien and continuing levy upon said wages, earnings and salary of said Charles W. Clark, the judgment debtor, since the presentation of said execution, to the defendant [fol. 16] herein, and up and to and including the 7th day of July, 1920 to the extent of 10% thereof to wit; $1.80 per week.

13. That the defendant wholly failed, neglected, and refused and still refuses to pay the same or the sum specified in said execution or any part thereof, contrary to the provisions of the aforesaid order of Hon. Benjamin Baker, and the provisions of Section 1391 of the Code of Civil Procedure; altho' said Charles W. Clark is still in the employ of the defendant herein.

14. That the said execution is still outstanding and said judgment remains wholly unsatisfied, unpaid and undischarged; and that at the time when the execution herein was presented to defendant, no other outstanding execution was issued against said Charles W. Clark to defendant herein.

Wherefore, plaintiff demands judgment against the defendant for the sum of $97.87 as follows: sum of $32.48 plus $1.38 Clerk's and Sheriff's fees, plus his lawful poundage, with interest from September 12th, 1918; sum of $26.45 plus $1.38 Clerk's and Sheriff's fees,

upon his second cause of action, interest from February 20th, 1920 plus the Sheriff's lawful poundage and fees; sum of $34.40 upon his third cause of action plus $1.38 Clerk's and Sheriff's fees, plus his lawful poundage and fees, with interest from September 22nd, 1919; besides the costs and disbursements of this action.

Moe Goldstein, Plaintiff Attorney, Security Building, Binghamton, N. Y.

[fol. 16a] STATE OF NEW YORK,
County of Broome,
City of Binghamton, ss:

William H. Smith, being duly sworn, deposes and says that he is the plaintiff in the within action; that he has heard read the foregoing complaint and knows the contents thereof, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

William H. Smith.

Sworn to before me this 22nd day of July, 1920. Moe Goldstein, Notary Public.

[fol. 17] NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

ANSWER

The defendant answers the complaint of the plaintiff as follows:
As to the first cause of action:

First

1. Defendant denies that it was a domestic corporation at all of the times mentioned in the complaint as alleged in Paragraph numbered 1 of the first cause of action set forth in the complaint herein.

2. Defendant admits the allegations of paragraph numbered 2 of the first cause of action of said complaint relating to the city judge and city court of the City of Binghamton, N. Y. and the jurisdiction thereof.

3. Defendant denies that the said Clinton L. Ogden was employed by the defendant as alleged in Paragraph numbered 6 of the first cause of action of said complaint at all times therein mentioned.

4. Defendant admits that there was served upon Elliot Spaulding, an officer of defendant, what purported to be a garnishee execution and that defendant has not paid the sums or any part thereof mentioned therein.

[fol. 18] 5. Defendant denies any knowledge or information sufficient to form a belief as to each of the allegations in the first cause

of action of said complaint contained not hereinbefore specifically admitted or denied.

Second

1. The defendant further answering the first cause of action alleged in the plaintiff's complaint and as a first and separate defense thereto alleges that the said complaint does not state facts sufficient to constitute a cause of action or to show jurisdiction of this court.

Third

1. The defendant further answering the first cause of action alleged in the plaintiff's complaint and as a second and separate defense thereto alleges that the said Clinton L. Ogden was not in the employ of defendant at the time of the presentation of the affidavit for procurement of an order directing the issuance of a garnishee execution, and that at the time of the issuance of said order and of an execution thereunder and the service thereof referred to in the first cause of action of said complaint, the said Clinton L. Ogden was not in the employ of the defendant herein and that because thereof the said order and said garnishee execution therein referred to in the first cause of action of plaintiff's complaint were both and each of them is null, void and of no effect and that the said execution was not and is not binding upon the defendant herein.

Fourth

1. The defendant further answering the first cause of action al- [fol. 19] leged in plaintiff's complaint and as a third and separate defense thereto alleges upon information and belief that the affidavit upon which the order was granted for the issuance of a garnishee execution against the wages of said Clinton L. Ogden referred to in Paragraph of said complaint numbered 7 of the first cause of action therein was incomplete, imperfect and insufficient upon which to base a garnishee execution against the wages due or to become due from any employer of said Clinton L. Ogden to said Clinton L. Ogden mentioned in the first cause of action of the said complaint; that the order granted by the said Hon. Benjamin Baker, Broome County Judge, referred to in Paragraph of said complaint numbered 7 of the first cause of action of said complaint was irregular, null, void and of no effect; that the terms and provisions of the garnishee execution referred to in Paragraph of said complaint numbered 8 of the first cause of action were and are unauthorized and contrary to law and not in form as to be binding upon the defendant herein and that upon account thereof the said execution so issued thereunder was null, void and of no effect and not binding upon the defendant herein.

Fifth

The defendant further answering the first cause of action alleged in plaintiff's complaint and as a fourth and separate defense thereto

alleges upon information and belief that the provisions of Section 1391 of the Code of Civil Procedure under which the so-called garnishee execution referred to in the complaint was issued and the laws containing and relating to the same are contrary to and not within [fol. 20] the powers of the constitution of the State of New York and the constitution of the United States of America and that the provisions thereunder are null, void and of no effect, that the said law and all provisions thereunder are unconstitutional and contrary to provisions of the constitution of the State of New York and to the provisions of the constitution of the United States of America for the following reasons, to wit:

(*a*) That there is no general or specific authority contained in the constitution of the State of New York for the enactment of laws for the issuance of executions against the wages, earnings, salary or income of judgment debtors such as are set out in Section 1391 of the Code of Civil Procedure and such laws are in derogation of the Common Law.

(*b*) That said laws deprive the judgment debtor against whose wages a garnishee execution is issued of rights and privileges secured to citizens by the law of the land, and of his property without due process of law and without notice and in violation of the Fourteenth Amendment to the constitution of the United States and in violation of Section 1 and Section 6 of Article 1 of the constitution of the State of New York.

(*c*) That in their execution the said law and the procedure and proceedings thereunder operate unjustly, inequitably, and unequally as to different persons in that allowance is not made for varying requirements as to necessary family expenses in cases of different individuals, arising from larger number of dependents and as to any person arising from loss of time, large number of dependents, sickness of dependents and other like or similar exigencies.

[fol. 21] (*d*) That the said provisions of law in their execution and application make no allowance for increased cost of living and decreased purchasing power of money and thereby cause such hardship and deprivation of the necessities of life as to render the enforcement of such execution and operation thereof against public policy.

(*e*) That the enforcement of executions under said provisions of law modify and violate contracts between employer and employee without the consent of the contracting parties and without due notice or due process of law.

(*f*) That the appropriation of 10% of a weekly wage of $12.00 or more to the payment of executions against the wages of judgment debtors operates inequitably and against public policy as to persons whose weekly wages are from $12.00 to $13.31 both inclusive, and unequally in comparison with persons whose wages are below $12.00 or above $13.31 in that the deduction of 10% in such cases leaves for the judgment debtor less than the sum of $11.99 which amount the said law actually or presumptively makes exempt, and in effect declares necessary for living expenses.

As to the second cause of action:

First

1. Defendant admits that at the times mentioned in said complaint it was a domestic corporation.

2. Defendant admits the allegations of Paragraph designated number 2 of the second cause of action in said complaint relating to William F. Ingerson as Justice of the Peace and the Justice Court and the jurisdiction thereof.

[fol. 22] 3. Defendant admits that on the nineteenth day of February 1920 it received what purported to be a copy of an execution against the wages of Bert L. Lindsley.

4. Defendant admits that it has not paid any sum or sums on account of said execution.

5. Defendant denies that the execution against the wages of said Bert L. Lindsley was issued against 10 per centum of the sum of $30.00 or that the sum specified in the said execution to be paid by the defendant herein on account thereof was the sum of $3.00 weekly as alleged in Paragraphs numbered 9 and 10 of the second cause of action of said complaint.

6. Defendant denies any knowledge or information sufficient to form a belief as to each of the allegations of the second cause of action in said complaint contained not hereinbefore specifically admitted or denied.

Second

The defendant further, answering the second cause of action alleged in plaintiff's complaint and as a first and separate defense thereto alleges that the said complaint does not state facts sufficient to constitute a cause of action or to show jurisdiction of this court.

Third

1. The defendant further answering the second cause of action alleged in the plaintiff's complaint and as a second and separate defense thereto alleges upon information and belief that the affidavit upon which the order was granted for the issuance of an execution [fol. 23] against the wages of the said Bert L. Lindsley referred to in paragraph of said complaint numbered 7 was incomplete, imperfect and insufficient upon which to base an execution against the wages due or to become due from any employer of said Bert L. Lindsley to said Bert L. Lindsley mentioned in the complaint herein; that the order granted by said Hon. Benjamin Baker, Broome County Judge referred to in paragraph of said complaint numbered 7 was irregular, null, void and of no effect; that the terms and provisions of the garnishee execution referred to in the second cause of action of said complaint in paragraph of said complaint numbered 8 was unauthorized and contrary to law and was not in — form as to be binding upon the defendant herein and that upon account thereof the said execution so issued thereunder was null, void and of no effect and not binding upon the defendant herein.

Fourth

1. The defendant further answering the second cause of action alleged in plaintiff's complaint and as a third and separate defense thereto alleges upon information and belief that the provisions of Section 1391 of the Code of Civil Procedure under which the so-called garnishee execution referred to in the second cause of action of the complaint therein was issued and the laws containing and relating to the same are contrary to and not within the powers of the constitution of the State of New York and the constitution of the United States of America and that the provisions thereunder are null, void and of no effect, that said law and all provisions thereunder are unconstitutional and contrary to provisions of the constitution of the [fol. 24] State of New York and to the provisions of the constitution of United States of America for the following reasons, to wit:

(*a*) That there is no general or specific authority contained in the constitution of the State of New York for the enactment of laws for the issuance of executions against the wages, earnings, salary or income of judgment debtors such as are set out in Section 1391 of the Code of Civil Procedure and such laws are in derogation of the Common Law.

(*b*) That said laws deprive the judgment debtor against whose wages a garnishee execution is issued of rights and privileges secured to citizens by the law of the land, and of his property without due process of law and without notice and in violation of the Fourteenth Amendment to the constitution of the United States and in violation of Section 1 and Section 6 of Article 1 of the constitution of the State of New York.

(*c*) That in their execution the said law and the procedure and proceedings thereunder operate unjustly, inequitably, and unequally as to different persons in that allowance is not made for varying requirements as to necessary family expenses in cases of different individuals, arising from larger number of dependents and as to any person arising from loss of time, large number of dependents, sickness of dependents and other like or similar exigencies.

(*d*) That the said provisions of law in their execution and application make no allowance for increased cost of living and decreased purchasing power of money and thereby cause such hardship and [fol. 25] deprivation of the necessities of life as to render the enforcement of such execution and operation thereof against public policy.

(*e*) That the enforcement of executions under said provisions of law modify and violate contracts between employer and employee without the consent of the contracting parties and without due notice or due process of law.

(*f*) That the appropriation of 10% of a weekly wage of $12.00 or more to the payment of executions against the wages of judgment debtors operates inequitably and against public policy as to persons whose weekly wages are from $12.00 to $13.31 both inclusive, and unequally in comparison with persons whose wages are below $12.00 or above $13.31 in that the deduction of 10% in such cases leaves for

the judgment debtor less than the sum of $11.99 which amount the said law actually or presumptively makes exempt, and in effect declares necessary for living expenses.

As to the third cause of action:

First

1. Defendant admits that at the times mentioned in the third cause of said complaint it was and still is a domestic corporation.

2. Defendant admits the allegations contained in Paragraph numbered 2 of the third cause of action relating to H. L. Hart as being city judge, the city court of Binghamton and the jurisdiction thereof as therein stated.

3. Defendant admits that on or about September twenty-seventh, 1919 it received what purported to be a copy of an execution issued against the wages of Charles W. Clark.

[fol. 26] 4. Defendant admits that it has not paid anything to the Sheriff mentioned in said execution upon account thereof.

5. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of the third cause of action in said complaint not hereinbefore specially admitted or denied.

Second

1. The defendant further answering the third cause of action alleged in plaintiff's complaint and for a first and separate defense thereto alleges that the said complaint does not state facts sufficient to constitute a cause of action or to show jurisdiction of this Court.

Third

1. The defendant further answering the third cause of action alleged in plaintiff's complaint and as a second and separate defense thereto alleges upon information and belief that the affidavit upon which the order was granted for the issuance of an execution against the wages of the said Charles W. Clark referred to in paragraph of said complaint numbered 7 was incomplete, imperfect and insufficient upon which to base an execution against the wages due or to become due from any employer of said Charles W. Clark to said Charles W. Clark mentioned in the complaint herein; that the order granted by the said Hon. Benjamin Baker, Broome County Judge referred to in paragraph of said complaint numbered 7 was and is irregular, null, void and of no effect; that the terms and provisions of the garnishee execution referred to in the third cause of action of said complaint in paragraph numbered 8 were un-

[fol. 27] authorized and contrary to law and were not in form as to the binding upon the defendant herein and that upon account thereof the said execution so issued thereunder was null, void and of no effect and not binding upon the defendant herein.

Fourth

The defendant further answering the third cause of action alleged in plaintiff's complaint and as a third and separate defense thereto alleges upon information and belief that the provisions of Section 1391 of the Code of Civil Procedure under which the so-called garnishee execution referred to in the complaint was issued and the laws containing and relating to the same are contrary to and not within the power of the constitution of the State of New York and the constitution of the United States of America and that the provisions thereunder are null, void and of no effect, that the said law and all provisions thereunder are unconstitutional and contrary to provisions of the constitution of the State of New York and to the provisions of the Constitution of United States of America for the following reasons, to wit:

(*a*) That there is no general or specific authority contained in the constitution of the State of New York for the enactment of laws for the issuance of executions against the wages, earnings, salary or income of judgment debtors such as are set out in Section 1391 of the Code of Civil Procedure and such laws are in derogation of the Common Law.

(*b*) That said laws deprive the judgment debtor against whose wages a garnishee execution is issued of rights and privileges secured [fol. 28] to citizens by the law of the land, and of his property without due process of law and without notice and in violation of the Fourteenth Amendment to the constitution of the United States of and in violation of Section 1 and Section 6 of Article 1 of the constitution of the State of New York.

(*c*) That in their execution the said law and the procedure and proceedings thereunder operate unjustly, inequitably, and unequally as to different persons in that allowance is not made for varying requirements as to necessary family expenses in cases of different individuals, arising from larger numbers of dependents and as to any person arising from loss of time, large number of dependents, sickness of dependents and other like or similar exigencies.

(*d*) That the said provisions of law in their execution and application make no allowance for increased cost of living and decreased purchasing power of money and thereby cause such hardship and deprivation of the necessities of life as to render the enforcement of such execution and operation thereof against public policy.

(*e*) That the enforcement of executions under said provisions of law modify and violate contracts between employer and employee without the consent of the contracting parties and without due notice or due process of law.

(*f*) That the appropriation of 10% of a weekly wage of $12.00 or more to the payment of executions against the wages of judgment debtors operate inequitably and against public policy as to persons whose weekly wages are from $12.00 to $13.31, both inclusive, and unequally in comparison with persons who- wages are below $12.00 [fol. 29] or above $13.31 in that the deduction of 10% in such cases leaves for the judgment debtor less than the sum of $11.99 which

amount the said law actually or presumptively makes exempt, and in effect declares necessary for living expenses.

Wherefore, defendant demands judgment that plaintiff's complaint be dismissed with costs.

Maurice E. Page, Attorney for Defendant. Office and P. O. Address, Sales Building, Endicott, N. Y.

STATE OF NEW YORK,
County of Broome, ss:

Chester B. Lord, being duly sworn, deposes and says, that he is an officer of the defendant above mentioned, to wit its vice-president and that he is duly authorized to verify this answer.

That he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by defendant is that the said defendant is a corporation and not capable of making an affidavit except by or through an agent or officer thereof.

That the sources of deponent's information and the grounds of his belief as to the matters contained in said answer not stated upon deponent's knowledge are information received from agents or em-
[fol. 30] ployees of defendant and examination of various papers referred to in said complaint, or true copies thereof.

Chester B. Lord.

Subscribed and sworn to before me this 12th day of August, 1920. Bruce L. Babcock, Notary Public, in and for Cortland County. Certificate filed in Broome County.

NEW YORK SUPREME COURT

[Title omitted]

DECISION

This action having regularly come on for trial and been heard before Hon. George McCann, one of the justices of this Court, without a jury at Trial Term of this Court, held on the 13th day of September, 1920, upon the pleadings and proceedings herein, and the proofs of both parties having been adduced and their respective counsel heard, and due deliberation having been had thereon, I do decide and find as follows:

[fol. 31] Findings of Fact of First Cause of Action

1. That the defendant is now and was at all the times hereinafter mentioned a domestic corporation.

2. That at all times hereinafter mentioned H. L. Hart, Esq., a resident of the City of Binghamton, Broome County, N. Y., was and is a City Judge, duly elected and qualified as such, in and for the City of Binghamton, Broome County, N. Y., and that by virtue of the laws of the State of New York and the Charter of the City of Binghamton, N. Y., he had power to hold court, issue process, and had jurisdiction to hear, try and determine actions on contracts to recover a sum of money only, provided the sum did not exceed the sum of $500.

3. That on or about September 12th, 1918, Fred A. Shaw and Earl Shaw duly commenced an action against Clinton L. Ogden, before H. L. Hart, Esq., in the City Court of Binghamton, and that on or about said date a summons in said action was duly issued by said City Judge out of his Court, and duly and personally served upon Clinton L. Ogden, the defendant therein named within the City of Binghamton, Broome County, N. Y., and said summons was made returnable on September 12th, 1918.

4. That such proceedings were thereafter duly had in said action that on September 12th, 1918 a judgment was duly made and given [fol. 32] by said City Court of Binghamton in favor of Fred A. Shaw and Earl Shaw, the plaintiffs in said action against Clinton L. Odgen, the defendant named in said action, for the sum of $34.48 which said judgment was duly entered and docketed in said Court, according to the laws and practice of the State of New York on said day.

5. That on September 18th, 1918 a transcript of said judgment was duly and regularly filed and docketed in the office of the Clerk of the County of Broome, at Binghamton, N. Y., and that on said day an execution upon said judgment against the property of said Clinton L. Ogden was duly issued by said County Clerk out of the County Court of Broome County to the Sheriff of the County of Broome, where said judgment debtor, Clinton L. Ogden resided and still resides, and that the said execution was duly returned wholly unsatisfied and wholly unpaid by said Sheriff of Broome County to the said Broome County Clerk's Office.

6. That said judgment debtor, Clinton L. Ogden, was on April 8th, 1919 up to and including April 17th, 1919 in the employ of Endicott-Johnson Company (a co-partnership); and that from April 17th, 1919, to the commencement of this action was in the employ of the defendant herein; at a regular weekly wage and salary of more than $12 per week and has earned and received the same weekly.

7. That on March 31st, 1919 the defendant herein duly filed its certificate of incorporation with the Secretary of State of the State of New York, and on April 1st 1919 filed a duplicate thereof in the Broome County Clerk's Office; and on April 17th, 1919 the defendant corporation took over all the assets and assumed all the lia- [fol. 33] bilities of the said Endicott-Johnson Company (the co-partnership).

8. That on or about April 8th, 1919 an order was duly made by Hon. Benjamin Baker, Broome County Judge, in the aforesaid

action, directing the issuance of an execution against the wages, earnings and salary of said judgment debtor Clinton L. Ogden, due and owing to him — to become due and owing to him from the said defendant herein, pursuant to and under §1391 of the Code of Civil Procedure of the State of New York.

9. That thereafter and on April 8th, 1919 a garnishee execution under and pursuant to the aforesaid order of Hon. Benjamin Baker, Broome County Judge was duly issued out of said Broome County Court in said action to the Sheriff of the County of Broome, N. Y., where the judgment debtor then resided and now resides, in favor of Fred A. Shaw and Earl Shaw and against Clinton L. Ogden the judgment debtor mentioned in said judgment.

10. That thereafter and on or about April 12th, 1919 said garnishee execution was duly presented to said defendant herein, Endicott-Johnson Corporation, by the Sheriff of the County of Broome, and at the same time a copy of said garnishee execution was presented to and delivered personally and left with Elliott Spawling, an officer of the defendant herein.

11. That said garnishee execution then was a lien and continuing levy upon the wages, earnings and salary of said Clinton L. Ogden, the judgment debtor; due or to become due to said Clinton L. Ogden from the defendant herein, up to and including January 24th, 1920.

[fol. 34] 12. That the defendant herein has wholly failed, neglected and refused, and still refuses to pay over to the Sheriff of the County of Broome, or to retain out of said Judgment debtor's wages, earnings and salary ten per centum thereof to apply on said judgment; although due demand therefor was duly and personally made by the Sheriff of the County of Broome before the commencement of this action upon the defendant herein, and while the said judgment debtor herein was still in the employ of the defendant herein.

13. That said judgment debtor, Clinton L. Ogden was continuously employed by the defendant herein from April 12th, 1919, to January 24th, 1920 and received from said defendant during said period the average weekly earnings as wages between $28 to $35; and that there was a sufficient sum coming from the defendant to the said judgment debtor Clinton Ogden to pay the judgment and garnishee execution as aforesaid, if ten per cent had been deducted weekly from such wages by the defendant herein.

14. That said garnishee execution is still outstanding, unpaid and undischarged, and said judgment remains wholly unsatisfied; and that no other or prior execution was issued and outstanding against wages of said judgment debtor, Clinton L. Ogden.

15. That by reason of the refusal, neglect and failure of the defendant herein to comply with the aforesaid garnishee order, there had become due and payable to the plaintiff herein upon said garnishee execution the sum of $32.48 principal; $1.38 Clerk's and Sheriff's fees for issuing and filing execution; $3.57 Sheriff's fees; $2.60 interest from September 12th, 1918 to January 25th, 1920, making a total sum of $40.03.

[fol. 35] 16. That thereafter and prior to the commencement of this action the said Earl Shaw and Fred A. Shaw, duly assigned, transferred and set over all their right, title and interest in and to the aforesaid judgment, execution and rights of action thereunder to the plaintiff herein, who is now the true and lawful owner and holder thereof.

Second Cause of Action

1. That the defendant is now and was at all the times hereinafter mentioned a domestic corporation.

2. That at all the times hereinafter mentioned W. F. Ingerson, Esq., was a resident of the Town of Union, Broome County, N. Y., and is a Justice of the Peace in and for said Town, having been duly elected and qualified as such; and that by virtue of the laws of the State of New York, he had power to hold court, issue process, and had jurisdiction to hear, try and determine actions on contracts to recover a sum of money only, provided the sum did not exceed the sum of $200.00.

3. That on or about November 29th, 1919 Oscar M. Austin duly commenced an action against Bert L. Lindsley, before W. F. Ingerson, Esq., in Justice's Court, Town of Union, and that on or about said date a summons in said action was duly issued by said Justice out of his said Court, and duly and personally served upon Bert L. Lindsley, the defendant therein named within the Town of Union, Broome, County, N. Y., and said summons was made returnable on December 10th, 1919.

4. That such proceedings were thereafter duly had in said action, that on December 10th, 1919 a judgment was duly made and given [fol. 36] by said Justice's Court, Town of Union, in favor of Oscar M. Austin, the plaintiff in said action against Bert L. Linsley, the defendant named in said action, for the sum of $26.45 damages and costs, which said judgment was duly entered and docketed in said Justice's Court, according to the laws and practice of the State of New York on said day.

5. That on December 17th, 1919 a transcript of said judgment was duly and regularly filed and docketed in the office of the Clerk of the County of Broome, at Binghamton, N. Y., and that on said day an execution upon said judgment against the property of said Bert L. Linsley was duly issued by said County Clerk out of the County Court of Broome County to the Sheriff of the County of Broome, where said judgment debtor, Bert L. Lindsley, resided and still resides, and that the said execution was duly returned wholly unsatisfied and wholly unpaid by said Sheriff of Broome County to the said Broome County Clerk's Office.

6. That said judgment debtor, Bert L. Lindsley, was on and from February 15th, 1920 to July 24th, 1920 actually in the employ of the defendant herein at a regular weekly wage and salary of more than $12 per week and has earned and received the same weekly.

7. That on or about February 17th, 1920 an order was duly made by Hon. Benjamin Baker, Broome County Judge, in the aforesaid

action, directing the issuance of an execution against the wages, earnings and salary of said judgment debtor, Bert L. Lindsley, due and owing to him and to become due and owing to him from the said [fol. 37] defendant herein, pursuant to and under §1391 of the Code of Civil Procedure of the State of New York.

8. That thereafter and on February 17th, 1920 a garnishee execution under and pursuant to the aforesaid order of Hon. Benjamin Baker, Broome County Judge was duly issued out of said Broome County Court in said action to the Sheriff of the County of Broome, N. Y., where the judgment debtor then resided and now resides, in favor of Oscar M. Austin and against Bert L. Lindsley, the judgment debtor mentioned in said judgment.

9. That thereafter and on or about February 20th, 1920 said garnishee execution was duly presented to said defendant herein, Endicott-Johnson Corporation, by the Sheriff of the County of Broome, and at the same time a copy of said garnishee execution was presented to and delivered personally and left with an officer of the defendant herein.

10. That said garnishee execution then was a lien and continuing levy upon the wages, earnings and salary of said Bert L. Lindsley, the judgment debtor; due or to become due to said Bert L. Lindsley from the defendant herein, up to and including July 24th, 1920.

11. That the defendant herein has wholly failed, neglected and refused and still refuses to pay over to the Sheriff of the County of Broome, or to retain out of said Judgment's debtor's wages earnings and salary ten per centum thereof to apply on said judgment; although due demand therefor was duly and personally made by the Sheriff of the County of Broome before the commencement of this [fol. 38] action upon the defendant herein, and while the said judgment debtor herein was still in the employ of the defendant herein.

12. That said judgment debtor, Bert L. Lindsley, was continuously employed by the defendant herein from February 15th, 1920 to July 24th, 1920, and received from said defendant during said period the average weekly earnings as wages between $25 to $35; and that there was a sufficient sum coming from the defendant to the said judgment debtor, Bert L. Lindsley, to pay the judgment and garnishee execution as aforesaid, if ten per cent had been deducted weekly from such wages by the defendant herein.

13. That said garnishee execution is still outstanding, unpaid and undischarged, and said judgment remains wholly unsatisfied; and that no other or prior execution was issued and outstanding against the wages of said judgment debtor, Bert L. Lindsley.

14. That by reason of the refusal, neglect and failure of the defendant herein to comply with the aforesaid garnishee order, there had become due and payable to the plaintiff herein upon said execution, the sum of $26.45 as principal; $1.38 Clerk's and Sheriff's fees for issuing and filing execution; $.93 interest from December 10th, 1919 to July 24th, 1920; $3.40 Sheriff's fees and poundage, making a total sum of $32.16.

15. That thereafter and prior to the commencement of this action, the said Oscar M. Austin duly assigned, transferred and set over all

his right title and interest in and to the aforesaid judgment, execution and rights of action thereunder to the plaintiff herein, who is now the true and lawful owner and holder thereof.

[fol. 39] Third cause of action:

1. That the defendant is now and was at all the times hereinafter mentioned a domestic corporation.

2. That at all the times hereinafter mentioned H. L. Hart, Esq., a resident of the City of Binghamton, Broome County, N. Y., was and is a City Judge, duly elected and qualified as such, in and for the City of Binghamton, Broome County, N. Y., and that by virtue of the laws of the State of New York, and the Charter of the City of Binghamton, N. Y., he had power to hold court, issue process, and had jurisdiction to hear, try and determine actions on contracts to recover a sum of money only, provided the sum did not exceed the sum of $500.

3. That on or about July 19th, 1919 the plaintiff herein duly commenced an action against Charles W. Clark, before H. L. Hart, Esq., in the City Court of Binghamton, and that on or about that date a summons in said action was duly issued by said City Judge out of his Court, and duly and personally served upon said Charles W. Clark, the defendant therein named within the City of Binghamton, Broome County, N. Y., and said summons was made returnable on July 19th, 1919.

4. That such proceedings were thereafter duly had in said action, that on July 19th, 1919 a judgment was duly made and given by said City Court of Binghamton in favor of the plaintiff herein, who was the plaintiff in said action, against Charles W. Clark, the defendant named in said action, for the sum of $34.40 damages and costs which said judgment was duly entered and docketed in said [fol. 40] Court, according to the laws and practice of the State of New York on said day.

5. That on August 7th, 1919, a transcript of said judgment was duly and regularly filed and docketed in the office of the Clerk of the County of Broome, at Binghamton, N. Y., and that on said day an execution upon said judgment against the property of said Charles W. Clark was duly issued by said County Clerk out of the County Court of Broome County to the Sheriff of the County of Broome, where said judgment debtor, Charles W. Clark, resided and still resides, and that the said execution was duly returned wholly unsatisfied and wholly unpaid by said Sheriff of Broome County to the said Broome County Clerk's Office.

6. That said judgment-debtor, Charles W. Clark, was on and from September 27th, 1919 to July 31st, 1920, actually in the employ of the defendant herein at a regular weekly wage and salary of more than $12 per week and has earned and received the same weekly.

7. That on or about September 22nd, 1919, an order was duly made by Hon. Benjamin Baker, Broome County Judge, in the aforesaid action, directing the issuance of an execution against the wages, earnings and salary of said judgment debtor Charles W. Clark, due and owing to him and to become due and owing to him from the

said defendant herein, pursuant to and under §1391 of the Code of Civil Procedure of the State of New York.

8. That thereafter and on April 8th, 1919 a garnishee execution under and pursuant to the aforesaid order of Hon. Benjamin Baker, Broome County judge was duly issued out of said Broome County [fol. 41] Court in said action to the Sheriff of the County of Broome, N. Y. where the judgment debtor then resided and now resides, in favor of the plaintiff herein, and against the said judgment debtor, Charles W. Clark.

9. That thereafter and on or about September 27th, 1919 said garnishee execution was duly presented to said defendant herein, Endicott-Johnson Corporation, by the Sheriff of the County of Broome, and at the same time a copy of said garnishee execution was presented to and delivered personally and left with Maurice E. Page, Esq., an officer of the defendant herein, to wit; its Secretary.

10. That said garnishee execution then was a lien and continuing levy upon the wages, earnings and salary of said Charles W. Clark, the Judgment debtor; due or to become due to said Charles W. Clark from the defendant herein, up to and including July 31st, 1920.

11. That the defendant herein has wholly failed, neglected and refused, and still refuses to pay over to the Sheriff of the County of Broome, or to retain out of said judgment debtor's wages, earnings and salary ten per centum thereof to apply on said judgment; although due demand therefor was duly and personally made by the Sheriff of the County of Broome before the commencement of this action upon the defendant herein, and while the said judgment herein was still in the employ of the defendant herein.

12. That said judgment debtor, Charles W. Clark was continuously employed by the defendant herein from September 27th, 1919 until [fol. 42] July 31st, 1920 and received from said defendant during said period the average weekly earnings as wages $30.00; and that there was a sufficient sum coming from the defendant to the said judgment debtor, Charles W. Clark, to pay the judgment and garnishee execution as aforesaid, if ten per cent had been deducted weekly from such wages by the defendant herein.

13. That said garnishee execution is still outstanding, unpaid and undischarged, and said judgment remains wholly unsatisfied; and that no other or prior execution was issued and outstanding against wages of said judgment debtor, Charles W. Clark.

14. That by reason of the refusal, neglect and failure of the defendant herein to comply with the aforesaid garnishee order, there had become due and payable to the plaintiff herein upon said garnishee execution the sum of $34.40 principal; $1.38 Clerk's and Sheriff's fees for issuing and filing execution; $3.63 Sheriff's fees and poundage; $2.06 interest from July 19th, 1919 to July 31st, 1920, making a total sum of $41.47.

And do further decide as conclusions of law—

1. That all of the garnishee orders and executions referred to in plaintiff's complaint are valid and binding upon the defendant herein, from date of their respective service upon the defendant herein, to the commencement of this action.

2. That there is due and owing from the defendant to the plaintiff upon his first cause of action the sum of $40.03 with $3.88 [fol. 43] interest from January 25th, 1920 to date hereof, making a total sum of $43.91; upon his second cause of action the sum of $32.16 with $1.80 interest from July 24th 1920 to date hereof, making a total sum of $33.96; upon his third cause of action the sum of $41.47 with $2.35 interest from July 31st, 1920 to date hereof, making a total sum of $43.82; making the aggregate total sum of $121.69.

3. That the plaintiff is entitled to judgment against the defendant for the sum of $121.69 with costs, which are hereby awarded to the plaintiff and against the defendant and I hereby direct judgment accordingly.

Dated, Elmira, N. Y., July 18th, 1921.

George McCann, Justice Supreme Court.

NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

JUDGMENT

The issues in this action having been brought on for trial before Hon. George McCann, without a jury, at a Trial Term of the Court [fol. 44] commencing on the 13th day of September, 1920 at the Court House in the City of Binghamton, in the County of Broome, New York, and the plaintiff having appeared by Moe Goldstein, and the defendant having appeared by Maurice E. Page, and the issues having been tried, and the Court having made its Findings of Fact and Conclusions of Law on July 18th, 1921 and awarding a judgment for the full amount as demanded in the complaint herein, now on motion, of Moe Goldstein, attorney for plaintiff, it is

Adjudged, that the plaintiff do recover of said defendant the sum of $121.69, together with $95.56 costs, making a total sum of $217.25, and the plaintiff have execution therefor.

Judgment signed and entered this 23rd day of July, 1921.

F. P. Ockerman, Clerk.

(Endorsed)

SIR: Please take notice that the within is a copy of a judgment this day made and entered herein in the office of the Clerk of Broome County at Binghamton, N. Y.

Dated, Binghamton, N. Y., 7/23/21.

Yours, etc., Moe Goldstein, Attorney for Plaintiff.

To Maurice E. Page, Esq., Attorney for Defendant.

[fol. 45] NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

DEFENDANT'S EXCEPTIONS TO FINDINGS

Take Notice:

The defendant hereby excepts to the hereinafter named Findings of Fact and to the Conclusions of Law of the Court in the above entitled action which was tried before the Court without a jury as contained in the Findings filed in Broome County Clerk's Office accompanying its written decision, as follows:

First Cause of Action

To that portion of Finding of Fact numbered 1, which states by implication that the defendant was a corporation prior to March 31, 1919.

To Findings of Fact numbered 11 and 15.

To that portion of Finding of Fact numbered 16, which states that the plaintiff was the true and lawful owner and holder of the rights and interests alleged to have been transferred.

Second Cause of Action

To that portion of Finding of Fact numbered 1 which states by implication that the defendant was a corporation prior to March 31, 1919.

[fol. 46] To that portion of Finding of Fact numbered 6 which states that the said Bert L. Lindsley earned and received more than $12.00 per week during each week from February 15, 1920 to July 24, 1920.

To Findings of Fact numbered 10 and 14.

To that portion of Finding of Fact numbered 15 which states that the plaintiff is the true and lawful owner and holder of rights alleged to have been assigned.

Third Cause of Action

To that portion of Finding of Fact numbered 1 which states by implication that Endicott Johnson Corporation was a corporation prior to March 31, 1919.

To Findings of Fact numbered 10 to 14.

To Conclusions of Law numbered 1, 2 and 3, and to each and every part thereof.

Maurice E. Page, Attorney for Defendant, Sales Building, Endicott, N. Y.

To Moe Goldstein, Attorney for Plaintiff, and to F. P. Ockerman, County Clerk of Broome County, N. Y.

[fol. 47–50] SUPREME COURT, BROOME COUNTY

[Title omitted]

DEFENDANT'S REQUESTS TO FIND AND DISPOSITION THEREOF

This action having been heard before Hon. George McCann, one of the Justices of this Court without a jury, at a trial term of the Court, held on the 13th day of September, 1920, the defendant hereby requests the Court to make findings of fact which it considers were established by the evidence on said trial and rulings or conclusions of law as follows:

First Cause of Action

* * * * * * *

[fol. 51] Conclusions of Law

1. That the affidavit upon which the garnishee execution was based was insufficient in law.

2. That the garnishee order was not binding upon the defendant for the reason, among others, that the judgment debtor was not in defendant's employ when the order was issued.

3. The garnishee execution was null and void for the reasons, among others, that it was based upon an invalid order and directed defendant to withhold a portion of the earnings of a judgment debtor not in defendant's employ when the execution was served.

4. That the assignment of the judgment and of the rights of Fred A. Shaw and Earl Shaw thereunder to the plaintiff did not give the plaintiff a right of action under Section 1391 of the Code of Civil [fol. 52] Procedure, since this is a statutory right given to the Judgment Creditor alone.

5. That the garnishee execution was invalid and not binding upon the defendant for the reason among others that no provision was made therein for those weeks when the earnings of the judgment debtor might fall below the $12.00 statutory limit provided by Section 1391 of the Code of Civil Procedure.

6. That the garnishee law is unconstitutional under Article I, Section 6, of the Constitution of the State of New York.

7. That the garnishee law is unconstitutional and in violation of Article I, Section 1 of the Constitution of the State of New York.

8. The garnishee law is unconstitutional and in violation of the 14th Amendment of the Constitution of the United States.

9. That the garnishee law in its operation is contrary to public policy and void.

10. That the so-called garnishee execution was invalid and not binding upon the defendant for each of the following reasons:

(a) Because the so-called garnishee law under which said execution was issued is unconstitutional under Article I, Section 1 of the Constitution of the State of New York.

(*b*) Because the said garnishee law under which said execution was issued is unconstitutional under Article I, Section 6 of the Constitution of the State of New York.

(*c*) That the garnishee law under which the said execution was [fol. 53–55] issued is contrary to the provisions of the fourteenth amendment of the Constitution of the United States of America and therefore unconstitutional.

(*d*) That the garnishee law under which said execution was issued is contrary to public policy and void.

11. That the complaint in this action should be dismissed and the plaintiff nonsuited as to the first cause of action for the reason that not sufficient facts are stated therein to constitute a cause of action.

Requests of law Nos. 1-11 inclusive refused. Geo. McCann, J. S. C.

Second Cause of Action

* * * * * * *

[fol. 56] Conclusions of Law

1. That the affidavit upon which the garnishee execution was based was insufficient in law.

2. That the order for the garnishee execution was invalid.

3. That the garnishee execution was invalid and not binding upon the defendant, for the reason among others, that no exception was made therein for those weeks when the earnings of the judgment debtor might be less than the $12.00 statutory limit fixed by Section 1391 of the Code of Civil Procedure.

4. That the assignment of the judgment and of the rights of Oscar M. Austin thereunder to the plaintiff did not give the plaintiff a right of action under Section 1391 of the Code of Civil Procedure, since this is a statutory right given to the judgment creditor alone.

5. That the garnishee law is unconstitutional and in violation of Article I, Section 1 of the Constitution of the State of New York.

6. That the garnishee law is unconstitutional and in violation of Article I, Section 6 of the Constitution of the State of New York.

7. That the garnishee law is unconstitutional and in violation of the 14th Amendment to the Constitution of the United States of America.

8. That the garnishee law in its operation is contrary to public policy and void.

9. That the so-called garnishee execution was invalid and not binding upon the defendant for each of the following reasons:

[fols. 57–59] (*a*) Because the so-called garnishee law under which said execution was issued is unconstitutional under Article I, Section 1 of the Constitution of the State of New York.

(*b*) Because the said garnishee law under which said execution was issued is unconstitutional under Article I, Section 6 of the Constitution of the State of New York.

(*c*) That the garnishee law under which the said execution was issued is contrary to the provisions of the fourteenth amendment of

the Constitution of the United States of America and therefore unconstitutional.

(*d*) That the garnishee law under which said execution was issued is contrary to public policy and void.

10. That the complaint in this action should be dismissed and the plaintiff nonsuited as to the second cause of action for the reason that not sufficient facts are stated therein to constitute a cause of action.

Requests of Law Nos. 1-10 inclusive Refused. Geo. McCann, J. S. C.

Third Cause of Action

* * * * * * *

[fol. 60] Conclusions of Law

1. That the affidavit upon which the order for garnishee execution was based was insufficient in law.

2. That the order for the garnishee execution was invalid.

3. That the garnishee execution was invalid and not binding upon the defendant for the reason, among others, that no provision was made therein for those weeks when the earnings of the judgment debtor might fall below the $12.00 statutory limit provided by Section 1391 of the Code of Civil Procedure.

4. That the garnishee law is unconsti-tional under Article I, Section 1 of the Constitution of the State of New York.

5. That the garnishee law is unconstitutional and in violation of Article I, Section 6 of the Constitution of the State of New York.

6. That garnishee law is unconstitutional and in violation of the 14th Amendment of the Constitution of the United States.

7. That the garnishee law in its operation is contrary to public policy and void.

8. That the so-called garnishee execution was invalid and not binding upon the defendant for each of the following reasons:

(*a*) Because of the so-called garnishee law under which said execution was issued is unconstitutional under Article I, Section 1 of the Constitution of the State of New York.

[fol. 61] (*b*) Because the said garnishee law under which said execution was issued is unconstitutional under Article I, Section 6 of the Constitution of the State of New York.

(*c*) That the garnishee law under which the said execution was issued is contrary to the provisions of the fourteenth amendment of the Constitution of the United States of America and therefore unconstitutional.

(*d*) That the garnishee law under which said execution was issued is contrary to public policy and void.

9. That the complaint in this action should be dismissed and the plaintiff nonsuited as to the third cause of action for the reason that not sufficient facts are stated therein to constitute a cause of action.

Requests Nos. 1-9 preceding Refused. George McCann, J. S. C.
Respectfully submitted, Maurice E. Page, Attorney for Defendant, Sales Building, Endicott, N. Y.

[fol. 62] SUPREME COURT, BROOME COUNTY

[Title omitted]

DEFENDANT'S EXCEPTION TO REFUSALS TO FIND

This action having been tried before Hon. George McCann, one of the Justices of this Court, without a jury at a Trial Term of the Court held on the 13th day of September, 1920, and the Court having been requested by the defendant to make Findings of Fact which it considered were established by the evidence on the said trial and Rulings or Conclusions of Law and the Requests to Find certain of the said Conclusions of Law having been refused by the

Now, therefore, the defendant hereby excepts to the refusal of the said trial judge to find Conclusions of Law as requested as follows:

Conclusions of Law respectively numbered 1 to 11, inclusive, of the first cause of action.

Conclusions of Law respectively numbered 1 to 10, inclusive, of the second cause of action.

Conclusions of Law respectively numbered 1 to 9, inclusive, of the third cause of action.

Dated, August 11, 1921.

Maurice E. Page, Attorney for Defendant, Sales Building, Endicott, N. Y.

To Moe Goldstein, Attorney for Plaintiff, and to F. P. Ockerman, County Clerk of Broome County.

[fol. 63] IN SUPREME COURT, BROOME COUNTY

CLERK'S MINUTES OF TRIAL

Minutes of a Trial and Special Term of the Supreme Court Held in and for Broome County at the County Court House, in the City of Binghamton, N. Y., on September 13, 1920.

Present: Hon. George McCann, Justice Presiding; F. P. Ockerman, Clerk; Whitney A. Moore, Crier; Bartlett M. Holcomb, Sheriff.

[Title omitted]

The above entitled action being No. 107 on the Trial Calendar of this Court having been moved for trial this 1st day of October, 1920, it having been stipulated by and between the attorneys for the respective parties to waive a jury trial, is tried by the Court.

Plaintiff's witnesses:

1. John Bartley.
2. Bartlett M. Holcomb.
3. Clinton L. Ogden.
4. John Bartley (re-called).
4. Bert Lindsley.
   Bartlett M. Holcomb (re-called).
5. Edwin Swart.
6. Charles W. Clark.

Plaintiff rests.

[fols. 64–95] Defendant offered no testimony; both parties to submit briefs to the Court within two weeks from the date hereof.
October 1, 1920.

* * * * * * *

[fol. 96] EVIDENCE: PLAINTIFF'S EXHIBIT 1

Transcript of Judgment—First Cause of Action

COUNTY OF BROOME,
City of Binghamton, ss:

Transcript of Judgment Rendered by City Court of Binghamton

FRED A. SHAW and EARL SHAW

against

CLINTON L. OGDEN.

Judgment rendered for the Plaintiff against the defendant, on the 13th day of September, 1918 for the sum of

Damages	$27.91
Costs	$4.50
Judgment	$32.41

BROOME COUNTY, *ss:*

I Certify that the above is a correct transcript of a judgment, rendered in said Court, and now remaining unsatisfied upon the docket.
Witness, H. L. Hart, City Judge of Binghamton, at the City of Binghamton this 13th day of September, 1918.
Rexford W. Titus, Clerk of the City Court of Binghamton.

(Endorsed:) Filed, Broome County Clerk's Office September 18, 1918, 3.05 P. M.

[fol. 97] EVIDENCE: PLAINTIFF'S EXHIBIT 2

Property Execution—First Cause of Action

The People of the State of New York to the Sheriff of the County of Broome, Greeting:

Whereas, Judgment was rendered on the 13th day of September, A. D. 1918, in the City Court of Binghamton, before Harold L. Hart, City Judge, against Clinton L. Ogden in favor of Fred A. Shaw and Earl Shaw for Thirty-two Dollars and Forty-one Cents, a Transcript of which was duly filed and Judgment docketed in the Clerk's Office of said County of Broome on the 18th day of September, 1918.

Wherefore, We command you that you satisfy the said Judgment out of the personal property of the said judgment debtor, in your County; and if sufficient property cannot be found, then out of the real property in your County belonging to the said judgment debtor, at the time when said judgment was so docketed in your County, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you, to the Clerk of the County of Broome.

Witness, my hand and the Seal of said County, at Binghamton, this 18th day of September, 1918.

F. P. Ockerman, Clerk.

[fol. 98] (Endorsed)

Levy $32.41/100 with interest from the 18th day of September, 1918 besides your fees and 75 cents, Clerk's fees, and return this execution within sixty days after its receipt by you to the Clerk of the County of Broome.

F. P. Ockerman, Clerk.

Rec'd Sept. 18, 1918 at 3.30 P. M.
Bartlett M. Holcomb, Sheriff, By John W. Weeks, Deputy Sheriff.

Return

The defendant has no goods or Chattels, Lands or Tenements, within my County, whereof I can make the amount of the within Execution, or any part thereof.

Dated, September 21st, 1918.

Bartlett M. Holcomb, Sheriff, By John V. Bartley, Dept. Sheriff.

Filed, Broome County Clerk's Office Sept. 21, 1918.

[fol. 99] EVIDENCE: PLAINTIFF'S EXHIBIT 3

COUNTY COURT, BROOME COUNTY

FRED A. SHAW and EARL SHAW, Plaintiff and Judgment Creditor,

against

CLINTON L. OGDEN, Defendant and Judgment Debtor.

Affidavit for Order Garnishee Execution—First Cause of Action

STATE OF NEW YORK,
County of Broome,
City of Binghamton, ss:

Moe Goldstein, being duly sworn, says that he is the attorney for the plaintiffs who are the judgment creditors in this proceeding; that in an action in the City Court of Binghamton before Hon. Harold L. Hart, City Judge, wherein the above named Fred A. Shaw and Earl Shaw were plaintiffs and the above named Clinton L. Ogden was defendant a Judgment was duly recorded and duly rendered against Clinton L. Ogden the judgment debtor herein on the 12th day of September, 1918, for $32.48 dollars, damages and costs; that the Judgment Roll in said action was duly filed and said judgment was thereafter duly docketed in the office of the Clerk of the said City Court on the 12th day of September, 1918; that a transcript [fol. 100] of said judgment was duly filed and said judgment was duly docketed in the office of the Clerk of the County of Broome on the 18th day of September, 1918; that thereafter an execution upon said judgment against the property of said judgment debtor Clinton L. Ogden was on the 18th day of September, 1918, duly issued out of the County Court Broome County which is a Court of Record to the Sheriff of the County of Broome, where said judgment debtor, Clinton L. Ogden, then and at the time of the commencement of this special proceeding resided and where he now resides (had and still has a place for the regular transaction of business); that the said Sheriff has wholly returned said execution unsatisfied, and that the said judgment remains wholly unpaid; and the said judgment was duly rendered and recovered upon personal service of the summons as required by Section 2458 of the Code of Civil Procedure, on Clinton L. Ogden, the defendant and judgment debtor herein. That the defendant is now employed by Endicott-Johnson Corporation at the Village of Johnson City, Broome County, N. Y. as a painter, receiving the sum of $30.00 per week as wages from said corporation, which exceeds $12.00 per week, and that the same is now due and owing to said Judgment Debtor and shall hereafter become due and owing to him. No previous application has been made for this order.

Moe Goldstein.

Sworn to before me this 7th day of April, 1919.
Joseph P. Mangan, Notary Public.

(Endorsed:) Read, 4-7-19 B. B. B. C. J.

[fol. 101] EVIDENCE: PLAINTIFFS' EXHIBIT 4

Order for Garnishee Execution—First Cause of Action

COUNTY COURT, BROOME COUNTY

FRED A. SHAW and EARL SHAW, Plaintiff and Judgment Creditor-,
against
CLINTON L. OGDEN, Defendant and Judgment Debtor.

Order

It appearing to my satisfaction, by the above affidavit of Moe Goldstein, attorney for the judgment creditors in the above entitled proceedings, that in an action in the City Court of Binghamton, before Hon. H. L. Hart City Judge, wherein the above named Fred A. Shaw and Earl Shaw were plaintiffs and the above named Clinton L. Ogden was defendant a judgment was duly recovered and duly rendered against Clinton L. Ogden the judgment creditor herein on the 12th day of September, 1918, for $32.48 dollars, damages and costs; that the judgment roll in said action was duly filed and said judgment was duly docketed in the office of the Clerk of the said City Court on the 12th day of September, 1918; that a transcript of said judgment was duly filed and said judgment was duly docketed in the office of the clerk of the County of Broome on the 18th day of [fol. 102] September, 1918; that thereafter an execution upon said judgment against the property of said judgment debtor was on the 18th day of September, 1918, duly issued out of the Broome County Court, which is a court of record, and the sheriff of the County of Broome where said judgment debtor then and at the time of the commencement of this special proceeding resided and where he now resides (had and still has a place for the regular transaction of business); that the said sheriff has wholly returned said execution unsatisfied and that the said judgment remains wholly unpaid; and the said judgment was duly rendered and recovered upon personal service of the summons as required by section 2458 of the Code of Civil Procedure, on Clinton L. Ogden the defendant and judgment debtor herein; that the defendant is now employed by Endicott-Johnson Corporation, of the Village of Johnson City, Broome County, N. Y., and is receiving the sum of $30 per week as wages from said corporation which exceeds $12 per week, and that the same is now unpaid and owing to the said judgment debtor and shall hereafter become due and owing to him. No previous application has been made for this order, Now therefore

It is ordered, that an execution issue herein out of this court to

the sheriff of the county of Broome against the wages of the above named defendant and judgment debtor, due and owing to him and which shall hereafter become due and owing to him, from the said Endicott-Johnson Corporation, of Johnson City, Broome County, N. Y., pursuant to section 1391 of the Code of Civil Procedure, which execution when presented by the Sheriff of the county of Broome to the said Endicott-Johnson Corporation shall become and be a lien [fol. 103] and continuing levy upon the wages due and to become due to the said Judgment debtor from the said Endicott-Johnson Corporation, to an amount which shall not exceed ten percentum thereof, and that the said levy shall become a continuing levy until such execution and the expenses thereof are fully satisfied and paid, or until modified as provided by section 1391 of the Code of Civil Procedure, and the amount of said levy and lien shall be the sum of $3 per week, and that the Clerk of this Court be, and he hereby is ordered to issue such execution.

Dated. County of Broome, April 7, 1919.

Benjamin Baker, Broome County Judge.

(Endorsed:) "Filed, Broome County Clerk's Office April 7, 1919."

EVIDENCE: PLAINTIFFS' EXHIBIT 5

Garnishee Execution—First Cause of Action

The People of the State of New York to the Sheriff of the County of Broome, Greeting:

Whereas, in a certain action in the City Court of Binghamton, before Hon. H. L. Hart, City Judge, between Fred A. Shaw and Earl Shaw, Plaintiffs and Clinton L. Ogden Defendant a Judgment was duly recovered and rendered on the 12th day of September 1918, [fol. 104] for $32.48 in favor of the said Plaintiffs and against the said Defendant after due personal service of the Summons and Complaint on said Defendant, as appears by the Judgment Roll filed therein in the office of the Clerk of the said Court on September 12th, 1918.

Whereas, a transcript of said Judgment was duly filed and said Judgment was duly docketed in the office of the Clerk of the County of Broome on the 18th day of September, 1918.

Whereas, an execution against the property of said Defendant and Judgment Debtor Clinton L. Ogden was duly issued out of the County Court of the State of New York, Broome County, upon said Judgment as provided by law to the sheriff of the County of Broome where the said Judgment Debtor then resided and still resides (had and still has a place for the regular transaction of business), and

Whereas, the said execution has been returned wholly unsatisfied and the sum of 32.48 with interest thereon from the 12th day of September, 1918, is now actually due and owing and unpaid thereon and no part of said Judgment has been paid, and

Whereas, the said Judgment Debtor Clinton L. Ogden is (are) now employed by Endicott-Johnson Corporation of the Village of Johnson City, Broome County, N. Y., receiving the weekly wages of $30 from said Corporation, and his wages exceed the sum of $12.00 per week and amount to the sum of Thirty Dollars per week and the same is payable to him by the said Endicott-Johnson Cor-
[fol. 105] poration, Johnson City, Broome County, N. Y., weekly and the same is now due and which shall hereafter become due and owing to him, and

Whereas, an order has been duly made herein by Hon. Benjamin Baker, the Judge of the Broome County Court on the 7th day of April, 1919, directing the issuance of this execution;

Now, therefore we command you that you satisfy said Judgment, with interest thereon from the date of its entry, together with your fees, out of the wages of the said Judgment Debtor, Clinton L. Ogden due and owing to him, and which shall hereafter become due and owing to him from the said Endicott-Johnson Corporation of Johnson City and Endicott, N. Y. pursuant to the provisions of Section 1391 of the Code of Civil Procedure, and that this execution and the levy to be made by you hereunder shall become a lien and a continuing levy upon the wages due and to become due to the said judgment debtor from the said Clinton L. Ogden to an amount which shall not exceed ten per centum of his said wages of $30.00, to wit: in the sum of $3.00 per week, and that the said levy shall become and be a lien and a continuing levy until this execution and the expenses thereof are fully paid and satisfied, and that you return this execution when satisfied to the Clerk of said Court, with your certificate thereon showing the manner in which you have executed the same.

Witness, Hon. Benjamin Baker, Judge of the Broome County Court this 7th day of April, 1919.

F. P. Ockerman, Clerk of the said Broome County Court.
Benjamin Baker, Judge, Broome County Court. (Seal.)

[fol. 106] (Endorsed:) To: Endicott-Johnson Corporation. Received, April 8th, 1919 at 4:16 p. m. Bartlett M. Holcomb, Sheriff, By: John V. Bartley, Under Sheriff.

EVIDENCE: PLAINTIFF'S EXHIBIT 6

Assignment of Judgment, etc.—First Cause of Action

We, Fred A. Shaw and Earl Shaw of the City of Binghamton, Broome County, N. Y. in consideration of the sum of $1.00 to us in hand paid by William H. Smith, of the same place, do hereby transfer all our right, title and interest in and to a certain judgment which we have obtained in the City Court of Binghamton on or about September 12, 1918, against Clinton L. Ogden and also all our right, title and interest in and to the garnishee execution issued upon the said judgment against Endicott-Johnson Corporation which directs it to pay a certain percentage out of the wages of the said Ogden;

also all our right, title and interest in and to any and all claims or actions arising out of the failure of the said Endicott-Johnson Corporation to comply with the terms and conditions of the aforesaid garnishee order and execution, in our stead; and we hereby authorize the said William H. Smith to institute, settle, compromise, and bring any action he may choose for said failure, against the said Endicott-[fol. 107] Johnson Corporation in our names or in his own, at his own cost and expense.

Dated, Binghamton, N. Y., July 20, 1920.

Fred A. Shaw and Earl Shaw, By Earl Shaw. F. A. Shaw & Son, By Earl Shaw.

(Duly acknowledged.)

EVIDENCE: PLAINTIFF'S EXHIBIT 7

Execution Against Property and Return N. B.—Second Cause of Action

The People of the State of New York to the Sheriff of the County of Broome, Greeting:

Whereas, judgment was rendered on the 10th day of December, A. D. 1919 in the City Court of Binghamton, before Harold L. Hart, City Judge, against Bert E. Lindsley in favor of Oscar M. Austin for Twenty-six Dollars and Seventy Cents, a transcript of which was duly filed and judgment docketed in the Clerk's Office of said County of Broome on the 17th day of December, 1919.

Wherefore, We command you that you satisfy the said Judgment out of the personal property of the said judgment debtor in your County, and if sufficient property cannot be found then out of the real property in your County belonging to the said judgment debtor, [fol. 108] at that time when said judgment was so docketed in your County, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you, to the Clerk of the County of Broome.

Witness my hand and the seal of said County at Binghamton this 17th day of December, 1919.

F. P. Ockerman, Clerk, By C. F. Tupper, Dep. Clerk.

(Endorsed:) Levy, $26.70 with interest from the 10th day of December, 1919 besides your fees and 75 cents, Clerk's fees, and return this execution within sixty days after its receipt by you to the Clerk of the County of Broome.

F. P. Ockerman, Clerk, By C. F. Tupper, Dep. Clerk.

Rec'd December 17, 1919 at 3:47 p. m.

Bartlett M. Holcomb, Sheriff, By John V. Bartley, Under Sheriff.

Return

The defendant has no goods or chattels, lands or tenements within my County, whereof I can make the amount of the within execution, or any part thereof.

Bartlett M. Holcomb, Sheriff, By John V. Bartley, Deputy Sheriff. Dated, December 19, 1919.

Filed Broome County Clerk's Office December 19, 1919.

[fol. 109] EVIDENCE: PLAINTIFF'S EXHIBIT 8

BROOME COUNTY COURT

OSCAR M. AUSTIN, Plaintiff and Judgment Creditor,

against

BERT E. LINDSLEY, Defendant and Judgement Debtor.

Affidavit for Order for Garnishee Execution—Second Cause of Action

STATE OF NEW YORK,
County of Broome,
City of Binghamton, ss:

Moe Goldstein, being duly sworn, says that he is the attorney for Oscar M. Austin, who is the judgment creditor in this proceeding; that in an action in the Justices Court, Town of Union, before W. F. Ingerson, Esq. Justice of the Peace wherein the above named Oscar M. Austin was plaintiff and the above named Bert E. Lindsley was defendant a judgment was duly recorded and duly rendered against Bert E. Lindsley the judgment debtor herein on the 10th day of December, 1919, for $26.40 dollars damages and costs; that the Judgment Roll in said action was duly filed and said judgment was duly docketed in the office of the said Justices Court on the 10th day of December, 1919; that a transcript of said judgment was duly filed and judgment was duly docketed in the office of the Clerk of the County of Broome on the 17th day of December, 1919; that there- [fol. 110] after an execution upon the said judgment against the property of said judgment debtor the 17th day of December, 1919 duly issued out of the Broome County Court to the Sheriff of the County of Broome where said judgment debtor then and at the time of the commencement of this special proceeding resided and where he now resides (had and still has a place for the regular transaction of business) that the said Sheriff has wholly returned said execution unsatisfied and that said judgment remains unpaid and the said judgment was duly rendered and recovered upon personal service of this summons as required by Section 2458 of the Code of Civil Procedure on Bert E. Lindsley the defendant and judgment debtor herein, that the defendant is now employed by Endicott-Johnson Corporation at its Johnson City factories, N. Y., and receives from

said corporation not less than $12.00 per week up to $20.00 per week as deponent has been informed by this judgment debtor which exceeds $12 per week and that the same is now due and owing to said judgment debtor and shall hereafter become due and owing to him. No previous application has been made for this order.

Moe Goldstein.

Sworn to before me this 17th day of February, 1920.
V. Ben Waterman, Notary Public.

(Endorsed:) Read 2-17-20. B. B., B. C. J.

[fol. 111] EVIDENCE: PLAINTIFF'S EXHIBIT 9

BROOME COUNTY COURT

OSCAR M. AUSTIN, Plaintiff and Judgment Creditor,

against

BERT E. LINDSLEY, Defendant and Judgment Debtor.

Order for Garnishee Execution—Second Cause of Action

It appearing to my satisfaction by the above affidavit of Moe Goldstein Judgment Creditor in the above-entitled proceeding, that in an action in the Justices Court, Town of Union, before W. F. Ingerson, Justice wherein the above named Oscar M. Austin was plaintiff and the above named Bert E. Lindsley was defendant a judgment was duly recovered and duly rendered against Bert E. Lindsley the judgment debtor herein on the 10th day of December, 1919, for $26.45 dollars, damages and costs; that the Judgment Roll in said action was duly filed and said Judgment was duly docketed in the offices of the said Justice Court on the 10th day of December, 1919: that a transcript of said judgment was duly filed and said judgment was duly docketed in the office of the Clerk of the County of Broome on the 17th day of December, 1919; that thereafter an execution upon said judgment against the property of said judgment debtor was on the 17th day of December, 1919, duly issued out of the Broome County [fol. 112] Court which is a Court of Record to the Sheriff of the County of Broome where said judgment debtor then and at the time of the commencement of this special proceedings resided and where he now resides (had and still has a place for the regular transaction of business); that the said Sheriff has returned said execution wholly unsatisfied and that the said judgment remains wholly unpaid; and the said judgment was duly rendered and recovered upon personal service of the summons as required by Section 2458 of the Code of Civil Procedure, on the defendant and judgment debtor, herein; that the defendant Bert E. Lindsley is now employed by Endicott-Johnson Corporation at its Johnson City, N. Y. factory and receives not less than $12 and up to $20 per week from said Corporation which exceeds $12.00 per week, and that the same is now due and owing to

said Judgment Debtor and shall hereafter become due and owing to him. No previous application has been made for this order, now therefore,

It is Ordered, That an execution issue herein out of this Court to the Sheriff of the County of Broome against the wages, salary, earnings of the above-named Defendant and Judgment Debtor, due and owing to him and which shall hereafter become due and owing to him from the said Endicott-Johnson Corporation pursuant to Section 1391 of the Code of Civil Procedure, which execution when presented by the Sheriff of the County of Broome to the said Endicott-Johnson Corporation shall become a lien and a continuing levy upon the wages, salary and earnings due and to become due to the said Judgment Debtor from the said Endicott-Johnson Corporation to an amount which shall not exceed ten percentum thereof, and that [fol. 113] said levy shall become a continuing levy until said execution and the expenses thereof are fully satisfied and paid, or until modified as provided for by Section 1391 of the Code of Civil Procedure, and the amount of said levy and lien shall be the sum of $1.20 per week, and that the Clerk of this Court be, and he hereby is, ordered to issue such execution.

Dated, County of Broome, N. Y. Feb. 17th, 1920.

Benjamin Baker, Broome County Judge.

EVIDENCE: PLAINTIFF'S EXHIBIT 10

Garnishee Execution Second Cause of Action

The People of the State of New York to the Sheriff of the County of Broome, Greeting:

Whereas, in a certain action in the Justices Court, Town of Union, before W. F. Ingerson, Justice of the Peace between Oscar M. Austin Plaintiff and Bert E. Lindsley Defendant a Judgment was duly recovered and rendered on the 10th day of December 1919 for $26.45 in favor of the said Plaintiff and against the said Defendant after due personal service of the Summons and Complaint on said Defendant as appears by the Judgment Roll filed therein in the office of the said Court on December 10th, 1919.

Whereas, a transcript of said Judgment was duly filed and said [fol. 114] judgment was duly docketed in the office of the Clerk of the County of Broome on the 17th day of December, 1919.

Whereas, an execution against the property of said Defendant and Judgment Debtor Bert E. Lindsley was duly issued out of the Supreme Court of the State of New York, Broome County, upon said Judgment as provided by law to the Sheriff of the County of Broome where the said Judgment debtor then resided and still resides (had and still has a place for the regular transaction of business), and

Whereas, the said execution has been returned wholly unsatisfied and the sum of $26.45 with interest thereon from the 10th day

of December, 1919, is now actually due and owing and unpaid thereon and no part of said Judgment has been paid, and

Whereas, the said Judgment Debtor Bert E. Lindsley is (are) now employed by Endicott Johnson Corporation, at Johnson City, N. Y. and his wages and earnings exceed the sum of $12.00 per week and amount to the sum of from $12.00 to $20 dollars per week, and the same is payable to him by the said Endicott-Johnson Corporation, weekly and the same is now due and which shall hereafter become due and owing to him, and

Whereas, an order has been duly made herein by Hon. Benjamin Baker one of the Justices of the said Broome County Court on the — day of January, 1920, directing the issuance of this execution;

Now therefore, we command you that you satisfy said Judgment, with interest thereon from the date of its entry, together with your fees, out of the wages and earnings of the said Judgment Debtor, Bert E. Lindsley due and owing to him, and which shall hereafter [fol. 115] become due and owing to him from the said Endicott-Johnson Corporation pursuant to the provisions of Section 1391 of the Code of Civil Procedure, and that this execution and the levy to be made by you hereunder shall become a lien and a continuing levy upon the wages and earnings due and to become due to the said Judgment Debtor from the said Endicott Johnson Corporation to an amount which shall not exceed ten per centum of his said wages of $12 to $20 to wit: in the sum of $1.20 per week, and that the said levy shall become and be a lien and a continuing levy until this execution and the expenses thereof are fully paid and satisfied, and that you return this execution when satisfied to the Clerk of said Court, with your certificate thereon showing the manner in which you have executed the same.

Witness, Hon. Benjamin Baker, one of the Justices of the said Broome County Court this — day of January, 1920.

F. P. Ockerman, Clerk of the said Broome County Court.
Benjamin Baker, Judge Broome County.

(Endorsed:) To Endicott Johnson Corporation, Endicott, N. Y. Rec'd Feb. 17th, 1920 at 3:22 p. m. Bartlett M. Holcomb, Sheriff, By Chas. Stone, Deputy.

[fol. 116] EVIDENCE: PLAINTIFF'S EXHIBIT 11

Assignment of Judgment, etc., Second Cause of Action

I, Oscar M. Austin, of the City of Binghamton, Broome County, N. Y. in consideration of the sum of $1.00 to me in hand paid by William H. Smith, of the same place, do hereby transfer all my right, title and interest in and to a certain judgment which I have obtained in the Justice Court, Town of Union on or about December 10, 1919 against Bert L. Lindsley and also all my right, title and interest in and to the garnishee execution issued upon the said judgment against Endicott-Johnson Corporation which directs it

to pay a certain percentage out of the wages of the said Lindsley; also all my right, title and interest in and to any and all claims or actions arising out of the failure of the said Endicott-Johnson Corporation to comply with the terms and conditions of the aforesaid garnishee order and execution, in my stead; and I hereby authorize the said William H. Smith to institute, settle, compromise, and bring any action he may choose for said failure, against the said Endicott-Johnson Corporation in my name or his own, at his own cost and expense.

Dated, Binghamton, N. Y., July 20, 1920.

Oscar M. Austin.

(Duly Acknowledged.)

[fol. 117] EVIDENCE: PLAINTIFF'S EXHIBIT 12

COUNTY COURT, BROOME COUNTY

WILLIAM H. SMITH, Plaintiff and Judgment Creditor,

against

CHARLES W. CLARK, Defendant and Judgment Debtor.

Affidavit for Order for Garnishee Execution, Third Cause of Action

STATE OF NEW YORK,
County of Broome,
City of Binghamton, ss:

Moe Goldstein, being duly sworn, says that he is the Attorney for William H. Smith who is the judgment creditor in this proceeding; that in an action in the city court of Binghamton, before Hon. H. L. Hart wherein the above named William H. Smith was plaintiff and the above named Charles W. Clark was defendant a judgment was duly recovered and duly rendered against Charles W. Clark the judgment debtor herein on the 19th day of July, 1919 for $34.40 dollars, damages and costs; that the Judgment Roll in said action was duly filed and said judgment was duly docketed in the office of the Clerk of the said City Court on the 19th day of July 1919; that a transcript of said judgment was duly filed and said judgment was duly docketed in the office of the Clerk of the County of Broome on the 7th day of August, 1919, that thereafter an execution upon said judgment against the property of said judgment [fol. 118] debtor Charles W. Clark was on the 8th day of August, 1919, duly issued out of the County Court, Broome County which is a Court of Record to the Sheriff of the County of Broome where said judgment debtor Charles W. Clark then and at the time of the commencement of this special proceeding resided and where he now resides (had and still has a place for the regular transaction of business); that the said Sheriff has wholly returned said execution wholly unsatisfied, and that the said judgment remains wholly unpaid and the said judgment was duly rendered and recovered upon

personal service of the summons as required by Section 2458 of the Code of Civil Procedure, on Charles W. Clark, the defendant and judgment debtor herein. That the defendant is now employed by Endicott, Johnson Corporation, at Johnson City factory, in the bottoming room, which said concern is paying debtor the weekly wages of about $18 which he so stated upon his examination in supplementary proceedings on September 18, 1919 which exceeds $12.00 per week and that the same is now due and owing to said Judgment Debtor and shall hereafter become due and owing to him. No previous application has been made for this order.

Moe Goldstein.

Sworn to before me this 20th day of September, 1919.
Clarence L. Chamberlain, Notary Public.

(Endorsed:) Read 9-22-19. B. B., B. C. J.

[fol. 119] EVIDENCE: PLAINTIFF'S EXHIBIT 13

COUNTY COURT BROOME COUNTY

WILLIAM SMITH, Plaintiff and Judgment Creditor,

against

CHARLES W. CLARK, Defendant and Judgment Debtor.

Order for Garnishee Execution—Third Cause of Action

It appearing to my satisfaction, by the above affidavit of Moe Goldstein, Attorney for William H. Smith, Judgment Creditor in the above-entitled proceeding, that in an action in the City Court of Binghamton, before Hon. H. L. Hart wherein the above named William H. Smith was plaintiff and the above named Charles W. Clark was defendant a judgment was duly recovered and duly rendered against Charles W. Clark the judgment debtor herein on the 19th day of July, 1919 for $34.40 dollars, damages and costs; that the Judgment Roll in said action was duly filed and said judgment was duly docketed in the office of the Clerk of the said City Court on the 19th day of July, 1919; that a transcript of said judgment was duly filed and said judgment was duly docketed in the office of the Clerk of the County of Broome on the 7th day of August, 1919; that thereafter an execution upon said judgment against the property of said judgment debtor Charles W. Clark was on the 7th day of August, 1919 duly issued out of the County Court Broome County which is a Court of Record to the Sheriff of the County of Broome where said judgment debtor Charles W. Clark [fol. 120] then and at the time of the commencement of this special proceeding resided and where he now resides (had and still has a place for the regular transaction of business); that the said

Sheriff has wholly returned said execution wholly unsatisfied and that the said judgment remains wholly unpaid; and the said judgment was duly rendered and recovered upon personal service of the summons as required by Section 2458 of the Code of Civil Procedure, on Charles W. Clark, the defendant and judgment debtor herein. That the defendant is now employed by Endicott-Johnson Corporation at Johnson City, N. Y. and receives the weekly wages of $18 which exceeds $12 per week, and that the same is now due and owing to said Judgment Debtor and shall hereafter become due and owing to him. No previous application has been made for this order, now, therefore,

It is Ordered, that an execution issue herein out of this Court to the Sheriff of the County of Broome against the wages of the above-named Defendant and Judgment Debtor, due and owing to him and which shall hereafter become due and owing to him from the said Endicott-Johnson Corporation pursuant to Section 1391 of the Code of Civil Procedure, which execution when presented by the Sheriff of the County of Broome to the said Endicott-Johnson Corporation shall be come and be a lien and a continuing levy upon the wages due and to become due to the said Judgment Debtor from the said Endicott-Johnson Corporation to an amount which shall not exceed ten per centum thereof, and that the said levy shall become a continuing levy until said execution and the expenses thereof are fully satisfied and paid, or until modified as provided for by Section 1391 [fol. 121] of the Code of Civil Procedure, and the amount of said levy and lien shall be the sum of $1.80 per week, and that the Clerk of this Court be, and he hereby is ordered to issue such execution.

Dated, County of Broome, September 22nd 1919.

Benjamin Baker, Broome County Judge.

(Endorsed:) Filed Broome County Clerk's Office, Sept. 22, 1919.

EVIDENCE: PLAINTIFF'S EXHIBIT 14

Garnishee Execution, Third Cause of Action

The People of the State of New York to the Sheriff of the County of Broome, Greeting:

Whereas, in a certain action in the City Court of Binghamton, before Hon. H. L. Hart between William H. Smith Plaintiff and Charles W. Clark Defendant a judgment was duly recovered and rendered on the 19th day of July, 1919, for $34.40 in favor of the said Plaintiff and against the said Defendant after due personal service of the Summons and Complaint on said Defendant, as appears by the Judgment Roll filed therein in the office of the Clerk [fol. 122] of the said Court on July 19th, 1919.

Whereas, a transcript of said judgment was duly filed and said judgment was duly docketed in the office of the Clerk of the County of Broome on the 7th day of August, 1919.

Whereas, an execution against the property of said Defendant and Judgment Debtor Charles W. Clark was duly issued out of the County Court of the State of New York, Broome County, upon said Judgment as provided by law to the Sheriff of the County of Broome where the said Judgment Debtor then resided and still resides (had and still has a place for the regular transaction of business), and,

Whereas, the said execution has been returned wholly unsatisfied and the sum of $34.40 with interest thereon from the 7th day of August, 1919 is now actually due and owing and unpaid thereon and no part of said Judgment has been paid, and,

Whereas, the said judgment Debtor Charles W. Clark is (are) now employed by Endicott Johnson Corporation, at Johnson City N. Y. and receives the sum of $18.00 per week, and his wages exceed the sum of $12.00 per week and amount to the sum of Eighteen ($18.00) dollars per week, and the same is payable to him by the said Endicott-Johnson Corporation weekly and the same is now due and which shall hereafter become due and owing to him, and

Whereas, an order has been duly made herein by Hon. Benjamin Baker, Broome County Judge on the 22nd day of September, 1919 directing the issuance of this execution;

Now, therefore, we command you that you satisfy said Judgment with interest thereon from the date of its entry, together with your [fol. 123] fees, out of wages of the said Judgment Debtor, Charles W. Clark due and owing to him which shall hereafter become due and owing to him from the said Endicott Johnson Corporation pursuant to the provisions of Section 1391 of the Code of Civil Procedure, and that this execution and the levy to be made by you hereunder shall become a lien and a continuing levy upon the wages due and to become due to the said Judgment Debtor from the said Endicott Johnson Corporation to an amount which shall not exceed ten per centum of his said wages of $18.00 to wit: in the sum of $1.80 per week, and that the said levy shall become and be a lien and a continuing levy until this execution and the expenses thereof are fully paid and satisfied and that you return this execution when satisfied to the Clerk of said Court, with your certificate thereon showing the manner in which you have executed the same.

Witness, Hon. Benjamin Baker Broome County Judge this 22nd day of September 1919.

F. P. Ockerman, Clerk of the Broome County Court. (L. S.)

(Endorsed:) To Endicott-Johnson Corporation, Johnson City, N. Y. Received Sept. 22nd, 1919 at 10.50 a. m. Bartlett M. Holcomb, Seriff, By John W. Weeks, Deputy Sheriff.

[fol. 124] SUPREME COURT, BROOME COUNTY

[Title omitted]

OPINION

Moe Goldstein, Esq., for plaintiff.
Maurice E. Page, for defendant.

Memorandum of Opinion

McCANN, *J.:*

This action was brought under the provisions of Section 1391 of the Code of Civil Procedure, for the purpose of recovering for the failure of the defendant to recognize and honor certain garnishee executions issued on three different judgments, amounting to $97.87 and interest thereon.

The complaint sets forth three causes of action and alleges—First: That Fred Shaw and Earl Shaw duly recovered a judgment against Clinton L. Ogden for $32.48 in the City Court of Binghamton, on September 12, 1918; that a transcript of said judgment was filed in Broome County Clerk's Office on the 18th day of September, 1918 and that said judgment thereupon became a judgment of the Broome County Court; that an execution against the property of said judgment debtor was duly issued and returned to the Sheriff as uncollected; that thereafter and on April 7, 1919, an application was made to Hon. Benjamin Baker, Broome County, Judge for an order to issue [fol. 125] an execution against the wages of the said judgment debtor, who it was alleged was at that time in the employ of the defendant. The affidavit upon which said order was granted was made by the attorney for the judgment creditors and stated that the judgment debtor was at that time employed by said Endicott Johnson corporation as a painter and receiving the sum of $30 a week as wages and that there was then due and owing to the judgment debtor and would thereafter become due and owing a sum in excess of $12 a week. The order contained the usual provisions of a garnishee order so-called and on the 12th day of April, 1919, was duly served upon an officer of the defendant. It appears from the testimony produced upon the trial, that the Endicott-Johnson Company a co-partnership was doing business in Endicott, N. Y. up to and including April 17, 1919, and that the defendant was incorporated as a domestic corporation under the laws of the State of New York, its certificate having been filed in the office of the Secretary of State on March 31st, 1919, and in the office of Broome County Clerk on April 1, 1919. On April 17, 1919, the defendant took over all the assets and assumed all the liabilities of the said co-partnership. The judgment debtor was employed by said co-partnership down to and including April 17, 1919, and from that date to January 24, 1920, he was employed by the defendant. It also appears that for the week ending April 12, 1919, there was earned by the judgment debtor from said co-

partnership the sum of $30.16 and for the first four days of the week ending April 19, 1919, to wit April 14, 1919 to April 17, 1919, inclusive, his wages were $13.35 and the total amount due from said [fol. 126] co-partnership to said judgment debtor was $43.51. It also appears that subsequent to April 17, 1919 the average weekly earnings of the judgment debtor from the defendant corporation was about $28 to $35 a week and that there was a sufficient sum coming from the defendant to the judgment debtor to pay the judgment in question, if ten per cent had been deducted weekly from such wages.

This cause of action alleges the assignment of the judgment and of the garnishee execution and of all the right, title and interest therein, to the plaintiff in this action.

The second cause of action alleges that a judgment was duly obtained in Justice's Court of Union, Broome County, New York, on December 10, 1919 for the sum of $26.45 in favor of Oscar M. Austin against Bert L. Lindsley; that a transcript of such judgment was filed in Broome County Clerk's Office on December 17, 1919 that said judgment thereupon became a judgment of the Broome County Court, and that an execution against the property of said judgment debtor was issued and was returned as uncollectible; that on February 17, 1920, upon an affidavit verified by the judgment creditor's attorney, an order was granted by the Broome County Judge, under the provisions of Section 1391 against the wages then due and to become due from the defendant to the judgment debtor, who, it was alleged at that time was an employee of the defendant and earning wages of upwards of $12 a week; that such execution was served upon the proper official of the defendant; that the judgment debtor was actually employed by the defendant from February 15, 1920, to July 24, 1920 and that the payment of wages made to him averaged from [fol. 127] $25 to $35 a week and were enough in amount to pay the judgment provided ten per cent thereof had been deducted during each and every week when such payments equalled or exceeded the sum of $12.

It is further alleged that said judgment together with the garnishee execution and all the right, title and interest of the judgment creditors was prior to the commencement of this action duly assigned to the plaintiff.

The third cause of action sets forth that the plaintiff recovered a judgment against one Charles W. Clark for $4.40 on July 19, 1919 in the City Court of Binghamton, N. Y., which judgment was transcripted to the County Court of Broome County and that an execution against the property of the judgment debtor was duly issued thereon and was returned uncollectible; that on the 22nd day of September, 1919, upon an affidavit verified by the plaintiff's attorney, an order was issued by the County Judge of Broome County directing an execution against the wages of the Judgment debtor then due or to become due from the defendant, it being alleged in the affidavit upon which the said order was granted, that said wages equalled or exceeded the sum of $12 per week; that the said execution was duly served upon the proper official of the defendant and that from September 27, 1919 until July 31, 1920, the wages paid by the defendant

to the said judgment debtor averaged about $30 a week and that the total sum so paid would have paid the execution provided ten per cent of each weekly wage had been deducted.

It is further alleged that none of said executions were ever paid [fol. 128] and that the defendant corporation never deducted any sum whatsoever from the wages of said judgment debtor nor did said defendant ever pay over to the plaintiff or to anyone other than the judgment debtors any of the wages so earned.

At the close of the plaintiff's case, upon the trial of this action, defendant moved for the dismissal of the complaint and for a non-suit and judgment on the ground that neither of the three causes of action alleged in the complaint had been proved and that the facts as proved did not constitute a cause of action against the defendant.

Testimony was offered by the defendant upon the various defenses interposed in his answer and the matter now comes up for decision after the trial of the issues involved.

The first objection raised by the defendant is that this being a statutory action, the same cannot be assigned but that the cause of action is for the benefit of the judgment creditors alone. The defendant in his brief offers no authority to sustain such proposition and inasmuch as this is a chose in action, I know no reason why it is not assignable and I so hold.

The second and third objections are that the garnishee law so-called under which this action is brought is against public policy and that the provisions of such Act are unconstitutional. It is sufficient answer to this to state that both of these questions have been passed upon by he Court of Appeals in this State and the constitutionality and validity of such Act has been sustained.

Laird v. Carton, 196 N. Y. 169.
Breary School v. Ward, 201 N. Y. 358.

[fol. 129] I therefore pass these three objections without further comment.

As to the first cause of action to wit, that based upon a judgment obtained in favor of Fred A. Shaw and Earl Shaw against Clinton L. Ogden, a further objection is offered that at the time of the granting of the order and of the service of the execution thereunder against the wages of the judgment debtor, he, the latter, was not in the employ of the defendant. Defendant's attorney presents a very elaborate argument upon this proposition and calls attention to the fact that at the time of the making of the affidavit which stated that the judgment debtor was in the employ of the defendant, he was not in fact in such employ, but was in the employ of the Endicott-Johnson co-partnership and that while the Endicott-Johnson corporation, the defendant, was then in existence and the garnishee execution was served upon the proper official of the said corporation, there was a misstatement of fact in the affidavit upon which the order for the garnishee execution was granted, and that therefore the order was ineffective and invalid and furthermore that the execution could not become a "levy" upon such wages or a "continuing" levy against the wages to become due unless the judgment debtor was at the time

of the granting of the order and of the levy of the execution, actually in the employ of the defendant corporation.

This raises a new question and my attention has not been called to any precedent. The disposition of this question rests also in part upon the proposition as to whether or not the defendant corporation was bound by the order or whether it can at this time attack the [fol. 130] order which recited the fact that the judgment debtor was at that time in the employ of the defendant and as to whether the defendant can raise upon the trial of this action the issue as to whether or not there was such an employment, I believe said issue may now be raised.

It was held in Van Valkenburg v. Bishop 164 N. Y. Supp., 86, in a case brought under the same Section of the Code, that the employer might raise the issue as to whether he owed the judgment debtor a debt. The question in this case was — to whether or not alimony payable to the judgment debtor was a debt and subject to execution.

The Court in that case says—

"At the threshold of the inquiry the question is presented whether the order directing such payment not having been appealed from or in any way modified is res adjudicata on the rights of the parties to the present action."

The reasons of the Opinion are then given and conclude with the statement—

"That the person standing in the position of the present defendant may have an opportunity not only to apply for a modification of the execution but also for a judgment declaring that he is not indebted to the person against whom the execution has been issued."

In the case at bar I might add that while I believe that he has the right to raise that issue, I think that he should be defeated upon such issue by reason of the fact that the language of the Code au-[fol. 131]thorities earnings or wages to become due to be subject to execution and inasmuch as the defendant retained the execution during the period while the judgment debtor was in its employ, it cannot now claim the benefits of a defense which otherwise might be meritorious.

Upon the question of the right to interpose such a defense in this action I also cite Rosenstock v. City of New York, 97 App. Div. 340 and Van Wie v. D. & H. R. R. Co., 71 Misc., 25.

In answer to the argument presented by defendant, it is claimed and the testimony shows it to be true, that on the 17th day of April, 1919, the day upon which the defendant corporation commenced business and upon which date the employment of the judgment debtor was transferred from that of the co-partnership to that of the defendant, all of the assets of the co-partnership were transferred to the defendant corporation. The defendant also assumed all of its debts, obligations and liabilities. It cannot be held that the corporation by so doing assumed any obligations other than those which

were legal obligations imposed upon the co-partnership. It cannot be claimed that the service of this execution which was issued against the Endicott-Johnson corporation ever became a lien upon any wages of the Endicott-Johnson co-partnership. It seems to me that the question to be determined is whether or not when this execution issued against the wages due or to become due from the Endicott-Johnson corporation, and was served upon the proper official of the corporation, the same became a lien upon any wages thereafter owing by the defendant corporation to the judgment debtor, notwithstand-
[fol. 132] ing the fact that he was not then in the employ of the corporation, and also notwithstanding the fact that the order required the issuing of the execution was based upon a false statement of fact. The question arises as to what was the duty of the Endicott-Johnson corporation when this garnishee execution was served upon its officer? Should it have moved to vacate or modify the order? As a matter of fact, they did nothing with reference to it, but now upon the trial of the action claim that the order was invalid. I realize the force of the argument that this is a statutory proceeding and must be strictly construed and also the argument presented by the defendant to the effect that no lien could be attached to something which was not in existence and that it could not become a "continuing levy" unless the "original levy" was made; nevertheless I believe that the very argument which requires that these special statutes should be construed strictly, require such strict construction in favor of the judgment creditor, as well as in favor of the employee and I therefore hold that Section 1391 of the Code of Civil Procedure means exactly what it says when it uses the following language—

"And on presentation of said execution by the officer to whom delivered for collection to the person or persons from whom such wages, earnings, salary, income from trust funds or profits are due and owing or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor, &c."

[fol. 133] I believe as hereinbefore indicated that the execution became a lien upon the wages which became due after the service of the order by reason of the retention of the execution and the waiver of the right which the employer had, to modify or vacate the same.

The objection is made also that in one of the causes of action the garnishee order and execution is invalid because it requires the collection of ten per cent of the wages earned by the judgment debtor without making an allowance for those weeks in which such wages might fall below the statutory sum of $12. I see no force to this argument, I think it is a matter of arithmetical computation on the part of the employer and that the order should not be declared invalid because of failure to state as above mentioned that ten per cent

shall only be deducted when the amount of such wages equals or exceeds the sum of $12 a week.

The plaintiff is entitled to a judgment for the amount claimed with interest and costs and findings and judgment may be prepared accordingly.

Dated July 13, 1921.

George McCann, Justice Supreme Court.

[fol. 134] In Supreme Court, Broome County

Stipulation Settling Case

It is hereby stipulated and consented that the foregoing case contains all the evidence and all of Appelant's exceptions made upon the trial, all of Appellant's exceptions to Findings of Fact and Conclusions of Law and all of Appellant's exceptions to Refusals to Find as requested;

It is also stipulated that an order may be made by Mr. Justice McCann, before whom said case was tried without a jury and by whom it was decided settling said case and exceptions as therein shown.

Dated, Nov. 4th, 1921.

Moe Goldstein, Attorney for Plaintiff, Respondent. Maurice E. Page, Attorney for Plaintiff, Appellant.

In Supreme Court, Broome County

Order Settling Case

I, George McCann, Justice of the Supreme Court, before whom the above case was tried without a jury and by whom it was decided,

Do hereby certify that the foregoing case contains all the evidence and all of the Appellant's exceptions presented upon the trial and during my consideration of the case, and I do hereby settle the foregoing case and exceptions and order that it be filed as settled.

Dated Nov. 5th, 1921.

George McCann, Justice Supreme Court.

[fol. 135] In Supreme Court, Broome County

Stipulation Waiving Certification

It is hereby stipulated by and between the parties to this action that the foregoing notice of appeal, complaint, answer, decision, judgment, case and exceptions, exceptions, requests to find and disposition thereof, and defendant's exceptions to refusals to find, opinion, stipulation and order settling the case as contained in the foregoing case on appeal are true copies of the originals and of the

whole thereof and certification thereof pursuant to statute is hereby waived.

It is also stipulated that an order may be made by Mr. Justice McCann, before whom said case was tried without a jury and by whom it was decided that the said case be filed by the Clerk of the Appellate Division in and for the Third Department.

Dated, Nov. 4th 1921.

Moe Goldstein, Attorney for Plaintiff-Respondent. Maurice E. Page, Attorney for Defendant-Appellant.

IN SUPREME COURT, BROOME COUNTY

ORDER FILING RECORD IN APPELLATE DIVISION

It is hereby ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Third Department.

Dated, Nov. 5th 1921.

George McCann, Justice Supreme Court.

[fol. 136] SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York for the Third Department Held at the City of Albany, Commencing on the Third Tuesday of November, 1921.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. John Woodward, Hon. A. V. S. Cochran, Hon. Henry T. Kellogg, Hon. Charles C. Van Kirk, Associate Justices.

[Title omitted]

ORDER OF AFFIRMANCE

The defendant above named having appealed from the judgment entered in this action in Broome County Clerk's Office on the 23rd day of July, 1921, for the sum of $217.25; also from the Findings of Fact and Conclusions of Law of the Hon. George McCann, dated July 18th, 1921; and said appeal having been duly heard and after hearing Moe Goldstein, attorney for plaintiff-respondent, and Maurice E. Page, attorney for defendant-appellant, and due delibera-
[fol. 137] tion having been had thereon, and the Court having unanimously decided and affirmed said judgment and Findings of Fact and Conclusions of Law, with costs,

Now, on motion of Moe Goldstein, attorney for said plaintiff-respondent, it is unanimously

Ordered, that said judgment and Findings of Fact and Conclusions of Law so appeal from be and the same hereby are in all things affirmed with costs to the plaintiff-respondent.

Joseph H. Holland, Clerk.

A Copy. Joseph H. Holland, Clerk.

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

At a Term of the Appellate Division Held at Albany, New York, Beginning on the Third Tuesday of November, 1921

[Title omitted]

JUDGMENT OF AFFIRMANCE

The defendant having appealed from the judgment entered in this [fol. 138] action in Broome County Clerk's Office on July 23rd, 1921, for the sum of $217.25; also from the findings of facts and conclusions of law of the Hon. George McCann, dated July 18th, 1921, to the Appellate Division, of the Supreme Court in and for the Third Department, and said appeal having been duly heard and said Appellate Division having unanimously ordered that the said judgment be affirmed with costs and disbursements of said appeal, and the plaintiff having given notice of taxation of cost,

Now on motion of Moe Goldstein, attorney for plaintiff, it is

Ordered and adjudged, that the judgment heretofore entered in the Broome County Clerk's Office, on July 23rd, 1921, in favor of William H. Smith, plaintiff-respondent, against Endicott-Johnson Corporation, defendant-appellant, for the sum of $217.25, be and the same hereby is affirmed, and is further

Ordered and adjudged, that the plaintiff-respondent, also recover of the said defendant-appellant, the sum of $77.58, being the costs and disbursements of said appeal herein as taxed, and he have execution therefore.

Judgment made and entered this 13th day of January, 1922.

Chas. H. Tupper, Dep. Clerk.

[fol. 139] SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

437/89

[Title omitted]

OPINION OF VAN KIRK, J., IN THE APPELLATE DIVISION

Argued November Term, 1921;
Decided, November Term, 1921.

Hon. John M. Kellogg, Presiding Justice; Hon. John Woodward, Hon. A. V. S. Cochrance, Hon. Henry T. Kellogg, Hon. Charles C. Van Kirk, Associate Justices.

An Appeal from a judgment of the Supreme Court, entered in Broome County, July 23rd, 1921, and from the findings made by the Court.

Maurice E. Page, (Bruce L. Babcock with him on the Brief) for the Appellant:

Moe Goldstein, for the Respondent.

VAN KIRK, *J.:*

The Endicott-Johnson Company was a partnership conducting a manufacturing business and employing many persons. On the 1st day of April 1919 the Endicott-Johnson Corporation, this defend- [fol. 140] ant, was organized to take over the business of the partnership, and it took over all the assets and assumed all the liabilities of the partnership on April 17, 1919. Three separate judgments were procured by different plaintiffs against employees of this corporation (the defendant here). An execution was issued upon each of said judgments and was returned unsatisfied. Thereupon in each case an application was made for a garnishee execution. The Court ordered such execution issued and such execution in each case was presented by the sheriff to the corporation, which retained the same, and in each case the corporation refused to comply with the garnishee order and refused to apply any of the wages of the defendant named in the execution to the payment of the execution, although in each case sufficient wages were due or became due the employees to pay the execution Sec. 1391 of the Code of Civil Procedure contains this: "Either party may apply at any time to the Court, from which such execution shall issue, or to any judge or justice issuing the same, or to the County Judge of the County * * * upon such notice to the other party as such Court, Judge or Justice shall direct for a modification of such execution, and upon such hearing the said Court, Judge or Justice, may make such modification of said execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided." No application was made for a modification of the execution in either case above referred to. In all essential facts, each case is like the other, with one ex- [fol. 141] ception: the first judgment was procured and the first garnishee execution issued and presented to this defendant corporation on the 12th day of April 1919, after it was duly organized, but before it had taken over actually the assets of the partnership. But I do not think this distinguishes the cause of action based upon this judgment and execution from the others, because the execution was retained and the earnings of the defendant employee, after April 17, 1919, when the corporation took over the business, were more than sufficient, applying the amount of the percentage directed in the order, to pay the judgment; and the section of the Code of Civil Procedure, 1391 (which is now Sec. 684 of the Civil Practice Act) provides that a garnishee execution issue against the wages of the judgment debtor and, on presentation of such execution by the officer to the person from whom wages are due, or may thereafter become

due and owing to the judgment debtor, "said execution shall become a lien and a continuing levy upon the wages * * * due or to become due to said judgment debtor, to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided." The three causes of action set forth in the complaint, each based upon the failure of this defendant to comply with the garnishee order, as above stated, may be treated as identical.

The plaintiff in this action was the judgment creditor in the third execution set forth in the complaint. The first and second causes of [fol. 142] action are based upon judgments and garnishee executions procured by other than the plaintiff, and they, judgment creditors of the employees of the defendant, have each assigned, prior to the commencement of the action, all the right, title and interest in and to the judgment execution and right of action thereunder, to the plaintiff, who thereupon became the true and lawful owner thereof in each case. Sec. 1391 of the Code of Civil Procedure provides: "It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall become indebted to such judgment-debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment-debtor. If such person or corporation, municipal, or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment-creditor named in such execution, and the amount so recovered by such judgment-creditor shall be applied towards the payment of said execution."

The causes of action set forth in the complaint are based upon this last quoted provision of the statute, and it is claimed by the appellant, that, as to the first and second causes of action, assigned to the plain- [fol. 143] tiff, there can be no recovery because this is a right of action existing solely under this statute and the liability to an action is given to the "judgment-creditor named in such execution", without naming the assigns of the judgment-creditor. Whatever the cause of action on which the judgment has been recovered, the judgment is in the nature of a contract between the judgment-debtor and the judgment-creditor, and the assignment of the judgment and execution is the assignment of a contract obligation. The assignment of the claim the judgment creditor had against this defendant is an assignment of a right of action upon a liability imposed by statute; this right of action is a chose in action (People v. Tioga C. P., 19 Wend., 73, 75; Gillet v. Fairchild, 4 Denio, 80, 82.)

The general rule is that all rights of action in tort, which do not apply to the person strictly, but are for injury to one's property or estate, are assignable (5 C. J., 889). A right of action for the

wrongful conversion of personal property is assignable (McKee v. Judd, 12 N. Y. 622). A right of action under the Sherman Act (passed July 2nd, 1890, ch. 647, Sec. 7), to recover treble damages for a conspiracy in restraint of trade, is assignable. (United Copper Securities Co. v. Amalgamator Copper Co., 232 Fed., 574, 577). A cause of action against Commissioner of Public Works of Schenectady, to recover damages for the refusal of defendant to allow the preference of a veteran, given by the constitution and statute, is an action for an injury to property rights, is assignable and survives (Burke v. Holtzman, 117 App. Div., 292, 293).

In the instant case the action is to recover the amount due on a [fol. 144] contract. All the facts are established necessary to subject this defendant, because it failed to obey the statute, to liability for this contract debt. The fact that the liability is given by statute does not change its nature. This statutory liability does not run to a particular class, nor is it in the nature of a personal privilege, not intended by the statute to be enjoyed by another, as in the case of a penalty; it is a liability in the process afforded to collect a contract indebtedness and is a liability for an injury to property rights (See Wickham v. Roberts, 112 App. Div., 742, 744). Any judgment-creditor of the employee may apply for and the Court must grant a garnishee execution. Such execution therefore could be had upon any assigned claim. It would be too narrow a construction of the statute to hold that it intended to deny the right to the assignee of the judgment creditor, who would have enjoyed the right had he taken an assignment of the indebtedness, recovered the judgment thereon in his own name and received thereon a granishee execution which the employer refused to pay. Claims of this character are often small; so small that a recovery thereon in the Supreme Court would not carry costs.

The appellant contends that the statute Sec. 1391 of the Code of Civil Procedure, *in* unconstitutional and offends against public policy. The judgment against the employee was regularly recovered and was valid. The execution issued thereon and returned unsatisfied was the usual and legal process for realizing the amount found due by the judgment. The garnishee execution is simply a [fol. 145] remedial process allowed by statute to be issued by the Court, or a judge of a Court of record, without notice to the judgment debtor and upon satisfactory proof of the required facts, to collect the amount due on the judgment; but either party may at any time apply to the Court for a modification of the execution. We think the Court of Appeals has passed upon these questions. In Laird v. Carton (196 N. Y., 169) it held that an execution against wages, under Sec. 1391 of the Code of Civil Procedure, can lawfully be issued on a judgment recovered before the amendment of September 1st, 1908, which permitted that such an execution issue on any money judgment. If the statute were unconstitutional the execution could not have been lawfully issued. In Brearly School v. Ward (201 N. Y., 358) the Court passed directly upon the constitutionality of this statute, holding that an execution can lawfully be issued, under this section of the Code, against the income of a trust

fund. Gray, J. dissented, not upon the ground that the law was unconstitutional but on the ground that the statute in question did not affect trusts created prior to its enactment.

We conclude that the questions in the case were properly disposed of by the trial Court, and that the judgment should be affirmed, with costs.

[fol. 146] NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

Please take notice, That the above named defendant hereby appeals to the Court of Appeals from the judgment in the above-entitled action in favor of the plaintiff and against the defendant entered in the office of the Clerk of the County of Broome on the thirteenth day of January, 1922, upon an order of the Appellate Division, Third Department, affirming the judgment of the Supreme Court in said action, entered in said Clerk's Office on the twenty-third day of July, 1921, for the sum of $217.25.

Dated, February 4, 1922. Yours, etc., Maurice E. Page, Attorney for Defendant-appellant.

To: Moe Goldstein, Attorney for Plaintiff-respondent, and Clerk of the County of Broome.

(Endorsed:) Filed Broome County Clerk's Office, February 8, 1922.

[fol. 147] IN THE COURT OF APPEALS

[Title omitted]

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated by and between the parties to this action that the foregoing order of Affirmance of the Appellate Division, the judgment entered on said order, the opinion of the Appellate Division and notice of appeal to the Court of Appeals are true copies of the originals and of the whole thereof and certification thereof pursuant to Statute is hereby waived.

Dated March 16, 1922.

Moe Goldstein, Attorney for Plaintiff-respondent. Maurice E. Page, Attorney for Defendant-appellant.

[fol. 148] STATE OF NEW YORK, *ss:*

COURT OF APPEALS

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15" day of December in the year of our Lord one thousand nine hundred and twenty-two, before the Judges of said Court.

Witness the Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. Barber, Clerk.

Remittitur Dec. 16, 1922.

[Title omitted]

REMITTITUR

Be it remembered, That on the 17" day of March, in the year of our Lord one thousand nine hundred and twenty-two, Endicott Johnson Corporation, the appellant in this cause, came here unto the Court of Appeals, by Maurice E. Page, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And William H. Smith, the respondent in said cause, afterwards appeared in said Court of Appeals by Moe Goldstein, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Maurice E. Page of counsel for the appellant, and submitted by counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the [fol. 149] proceedings in this court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said judgment be affirmed, with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. Barber, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, Dec. 16, 1922.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. Barber, Clerk. (L. S.)

[fol. 150] At an Adjourned Term of the Supreme Court Held in and for the County of Broome, at the Court-house, in the City of Binghamton, N. Y., on the 6th Day of January, 1923.

Present: Hon. Leon C. Rhodes, Justice.

SUPREME COURT, BROOME COUNTY

[Title omitted]

ORDER ADOPTING JUDGMENT OF COURT OF APPEALS AS JUDGMENT OF THIS COURT—Filed Jan. 8, 1923

A final judgment in this action in favor of the plaintiff and against the defendant having been entered in the Broome County Clerk's Office on July 23, 1921, for $121.69 damages and $95.56 costs, in all $217.25; and the defendant having appealed from said judgment to the Appellate Division of this Court in and for the Third Department and said judgment having been in all things unanimously affirmed with costs to the respondent, and said order of affirmance of said Appellate Division having been entered in the Broome County Clerk's Office on January 13, 1922; and the defendant having appealed from the judgment of affirmance entered pursuant to said order of affirmance of said Appellate Division to the Court of Appeals and said appeal having been duly argued at the Court of Appeals, and the Court of Appeals having ordered and adjudged that the said judgment appealed from be affirmed with costs to plaintiff, and having further ordered that the proceedings herein be remitted and the Supreme Court there to be proceeded upon according to law.

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Moe Goldstein, attorney for plaintiff, it is

Ordered, that said order and judgment of the Court of Appeals [fol. 151] be and the same hereby is made the order and judgment of this Court, with costs to the plaintiff in said Court of Appeals.

Enter.

Leon C. Rhodes, Justice Supreme Court.

[fol. 152] [File endorsement omitted.]

[fol. 153] SUPREME COURT, BROOME COUNTY

[Title omitted]

JUDGMENT ON REMITTITUR—Filed Jan. 8, 1923

A final judgment in this action in favor of the plaintiff and against the defendant having been entered in the Broome County Clerk's Office on July 23, 1921, for $121.69 damages and $95.56 costs, in all $217.25; and the defendant having appealed from said judgment to the Appellate Division of this Court in and for the Third Department, and said judgment having been in all things unanimously affirmed with costs to the respondent, and said order of affirmance of said Appellate Division having been entered in the Broome County Clerk's Office on January 13, 1922, and costs having been taxed in the sum of $77.58; and the defendant having appealed from the judgment of affirmance entered pursuant to said order of affirmance of said Appellate Division to the Court of Appeals, and the Court of Appeals having ordered and adju-ged that the said judgment appealed from be affirmed with costs to plaintiff, and the said Court of Appeals having sent hither its remittiture, filed herein on the 8th day of January, 1923, by which it appears that the said Court of Appeals has affirmed the said judgment appealed from with costs to the plaintiff, and has given judgment accordingly, and has remitted its said judgment to this Court to be enforced according to law and this court having by an order entered in the Broome County Clerk's office on January 8, 1923, ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the plaintiff's said costs in the Court of Appeals having been duly taxed at the sum of $127.60

Now, on motion of Moe Goldstein, attorney for plaintiff it is

[fol. 154] Adjudged, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court and the judgment appealed from be and the same hereby is in all things affirmed, and it is further

Adjudged, that the plaintiff, William H. Smith, recover of the defendant Endicott-Johnson Corporation, the sum of $127.60, the amount of his costs herein as taxed, and that said plaintiff have execution therefore. Judgment, dated this 8th day of January, 1923.

F. P. Ockerman, Clerk.

[fol. 155] [File endorsement omitted.]

[fol. 156] CLERK'S CERTIFICATE

STATE OF NEW YORK,
Broome County Clerk's Office, ss:

I, Frederick P. Ockerman, Clerk of the County Court and the Supreme Court of the State of New York, appointed to be held in and for the said County, being courts of record having a common seal,

do hereby certify that the above, annexed and foregoing is a full, true, and complete transcript *and* that portion of the record and proceedings had in the above entitled action which are designated under Group I of the Præcipe, as contained in the Stipulation annexed hereto, as the same appear on file and remain of record in my office.

I further certify that no separate paper containinrg an Opinion of the Court was filed, but that the Opinion of the Trial Court is found at folios 370 to 399, inclusive, of the case on appeal, written by Hon. George McCann, Justice of the Supreme Court, before whom the said case was tried, and that the Opinion of Mr. Justice Van Kirk, in the Appellate Division, is found at folios 415 to 435, inclusive, of the case on appeal.

I further certify that no Opinion of the Court of Appeals was filed.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said county and courts at the City of Binghamton, N. Y. this — day of May, 1923.

F. P. Ockerman, Clerk.

[fol. 157] COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Apr. 7, 1923

To the Hon. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

The petition of Endicott-Johnson Corporation, the appellant above named, respectfully shows:

That your petitioner is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business in the village of Endicott, County of Broome and State of New York;

That upon the order of the Court of Appeals of the State of New York dated the 16th day of December, 1922, and the Remittitur therefrom, judgment was entered in this action in the office of the Clerk of the County of Broome which said Clerk is a Clerk of the Supreme Court of the State of New York for the said County of Broome, on the sixth day of January, 1923; that said judgment so entered affirmed an order of the Appellate Division of the Supreme Court of the State of New York for the Third Department entered in the office of the Clerk thereof on the 13th day of January, 1922, and the judgment entered in the office of the said Clerk of the said County of Broome upon the said order on the 13th day of January, 1922; and said judgment upon said order of the Appellate Division affirmed the judgment of the Supreme Court of Broome County, entered in the office of the Clerk of the County of Broome on the 23rd day of July 1921.

[fol. 158] That the said Court of Appeals is the highest court in this state in which a decision in this action can be had;

That the said Endicott Johnson Corporation was and is aggrieved in that in said judgment and proceedings had prior thereto in this case, certain errors were committed therein to its prejudice; and in said action rights, privileges, and immunities were claimed by your petitioner under the constitution and statutes of the United States, and the decision of the said Court of Appeals was against the said rights, privileges, and immunities, especially set up and claimed under the constitution and statutes of the United States,—all of which will appear in detail from the Assignment of Errors filed herein, which are as follows:

I. The trial court, to wit, the Supreme Court of the State of New York, in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the law for the garnishment of wages, under which the execution was issued, is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States of America.

II. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the said garnishee law under which said execution issued is contrary to public policy and void.

III. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred for the same reasons and each thereof in findings as a Conclusion of Law that the defendant was indebted to the plaintiff in the sum of $40.03 with $3.88 interest from January 25th, 1920, making a total of $43.91 upon the first cause of action; and that the defendant was indebted to the plaintiff in the sum of $32.16 with $1.80 interest from July 24, 1920, making a total sum of $33.96 upon the second cause of action in said complaint; and that the defendant was indebted to the plaintiff in the sum of $41.47 with $2.35 interest from April 31, 1920, making a total sum of $43.82 upon the third cause of action [fol. 159] *said* forth in said complaint, making a total aggregate sum of $121.69, and that the plaintiff (defendant in error herein), is entitled to recover that sum from the defendant, (plaintiff in error herein), and that judgment be directed accordingly, together with costs of the action, in that by finding such Conclusion of Law, it in effect, held that the garnishee law was not unconstitutional as alleged in the answer of the defendant (plaintiff in error herein).

IV. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome erred for the same reasons and each thereof in granting an order directing judgment for the plaintiff (defendant in error herein).

V. The Supreme Court of the State of New York in and for the County of Broome erred in refusing to dismiss the complaint for the same reasons, and each thereof.

VI. The Appellate Division of the State of New York in and for the Third Department, erred in refusing to direct a dismissal of the complaint in the action below for the same reasons, and each thereof,

VII. The Appellate Division of the Supreme Court of the State of New York in and for the Third Department, erred in affirming judgment of the Supreme Court of the State of New York for the County of Broome hereinbefore referred to, for the same reasons, and each thereof.

VIII. The Court of Appeals of the State of New York erred in not directing a dismissal of the complaint in the action below, for the same reasons, and each thereof.

IX. The Court of Appeals of the State of New York erred in directing that the said judgment of the court below hereinbefore referred to be affirmed with costs, for the same reasons, and each thereof.

[fol. 160] Wherefore, Endicott Johnson Corporation prays for the allowance of a Writ of Error to the Supreme Court of the State of New York to the end that the record in said action may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed; and your Petitioner will every pray.

Endicott Johnson Corporation, By Maurice E. Page, Secretary. Maurice E. Page, Attorney for Endicott Johnson Corporation.

[fols. 161 & 162] STATE OF NEW YORK,
County of Broome, ss:

Maurice E. Page, being duly sworn, deposes and says: That he is an officer, to wit, the Secretary of Endicott Johnson Corporation, the petitioner hereinbefore named; that he is also the attorney for the said Endicott Johnson Corporation.

That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

Maurice E. Page.

Subscribed and sworn to before me this 4th day of April, 1923.
Bruce L. Babcock, Notary Public.

[fol. 163] [File endorsement omitted.]

[fols. 164-167] SUPREME COURT OF THE UNITED STATES

BOND FOR WRIT OF ERROR—[For $1,000.00; Approved, Hiscock, C. J. & Filed Apr. 7, 1923; Omitted in Printing]

[fol. 168] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Apr. 7, 1923

And now comes Endicott Johnson Corporation, Plaintiff in Error, and makes and files this its Assignment of Errors.

I. The trial court, to wit, the Supreme Court of the State of New York, in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the law for the garnishment of wages, under which the execution was issued is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States of America.

II. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the said garnishee law under which said execution issued is contrary to public policy and void.

III. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred for the same reasons and each thereof in finding as a Conclusion of Law that the defendant was indebted to the plaintiff in the sum of $40.03 with $3.88 interest from January 25th, 1920, making a total of $43.91 upon the first cause of action; and that the defendant was indebted to the plaintiff in the sum of $32.16 with $1.80 interest from July 24th, 1920, making a total sum of $33.96 upon the second cause of action in said complaint; and that the defendant was indebted to the plaintiff in the sum of $41.47 with $2.35 interest from April 31, 1920, making [fols. 169 & 170] a total sum of $43.82 upon the third cause of action set forth in said complaint, making a total aggregate sum of $121.69, and that the plaintiff (defendant in error herein), is entitled to recover that sum from the defendant (plaintiff in error herein), and that judgment be directed accordingly, together with costs of the action, in that by finding such Conclusion of Law, it in effect, held that the garnishee law was not unconstitutional as alleged in the answer of the defendant (plaintiff in error herein).

IV. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome erred for the same reasons and each thereof in granting an order directing judgment for the plaintiff (defendant in error herein).

V. The Supreme Court of the State of New York in and for the County of Broome erred in refusing to dismiss the complaint for the same reasons, and each thereof.

VI. The Appellate Division of the State of New York in and for the Third Department, erred in refusing to direct a dismissal of

the complaint in the action below for the same reasons, and each thereof.

VII. The Appellate Division of the Supreme Court of the State of New York in and for the Third Department, erred in affirming judgment of the Supreme Court of the State of New York for the County of Broome hereinbefore referred to, for the same reasons, and each thereof.

VIII. The Court of Appeals of the State of New York erred in not directing a dismissal of the complaint in the action below, for the same reasons, and each thereof.

IX. The Court of Appeals of the State of New York erred in directing that the said judgment of the court below hereinbefore referred to be affirmed with costs, for the same reasons, and each thereof.

Endicott Johnson Corporation, By Maurice E. Page, Secretary. Maurice E. Page, Attorney for Plaintiff in Error, Office and P. O. Address: Sales Bldg., Endicott, N. Y.

[fol. 171] [File endorsement omitted.]

[fols. 172 & 173] At Chambers of the Court of Appeals, State of New York, Held at the City of Syracuse on the 6th Day of April, 1923.

Present: Hon. Frank H. Hiscock, Chief Justice.

COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

ORDER FOR WRIT OF ERROR—Filed Apr. 7, 1923

Endicott Johnson Corporation, the Appellant above named, having filed and presented to this Court its petition praying for an allowance of a Writ of Error intended to be urged by it, praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States and such other and further proceedings may be had in the premises as may be just and proper upon the consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, it is

Ordered that a Writ of Error be allowed.

In testimony whereof, witness my hand this 6th day of April, 1923.

Frank H. Hiscock, Chief Judge of Court of Appeals, State of New York.

[fol. 174] [File endorsement omitted.]

[fol. 175] WRIT OF ERROR—Filed Apr. 7, 1923

UNITED STATES OF AMERICA:

The President of the United States of America to the Supreme Court of the State of New York in and for the County of Broome, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said state in which decision could be had in the said suit between William H. Smith, plaintiff, and Endicott Johnson Corporation, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question *of* the constitutionality of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such clause of the said constitution, statute, treaty or commission; a manifest error had happened to the great damage of the said defendant, as is said and appears by its complaint. We being willing that an error, if any hath been, should be duly corrected and full and speedy justice done *in* the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

[fols. 176 & 177] Witness, the Honorable William H. Taft, Chief Justice of the United States, this 6 day of April, in the year of our Lord one thousand nine hundred and twenty-three.

C. W. Higgison, Clerk of the Dist. Court of the U. S., Northern District of New York.

The above writ is allowed by—

Frank H. Hiscock, Chief Judge of the New York Court of Appeals. [Seal of U. S. Dist. Court.]

[fol. 178] [File endorsement omitted.]

[fols. 179 & 180] SUPREME COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF SERVICE—Filed May 7, 1923

STATE OF NEW YORK,
County of Broome, ss:

Charles E. Johnston, being duly sworn, deposes and says that he is over the age of eighteen years; that on the 9th day of April, 1923 he served the following papers in the action pending between the parties above named upon Moe Goldstein, attorney for the said William H. Smith:

Petition for Writ of Error,
Bond for Writ of Error,
Assignment of Errors,
Order for Writ of Error,
Writ of Error,
Citation,

by delivering to and leaving with the said Moe Goldstein true copies of the said papers, which said originals were filed in the office of the Clerk of the Supreme Court in and for the County of Broome, on the 9th day of April, 1923; that upon each of the said papers was a formal notice directed to the said Moe Goldstein, attorney for William H. Smith, and signed by Maurice E. Page, attorney for Endicott Johnson Corporation, that the original thereof was filed in the office of the Clerk of the County of Broome on the 9th day of April, 1923.

Charles E. Johnston.

Sworn to before me this 9th day of April, 1923.
Bruce L. Babcock, Notary Public.

[fol. 181] [File endorsement omitted.]

[fol. 182] CLERK'S CERTIFICATE

STATE OF NEW YORK,
Broome County Clerk's Office, ss:

I, Frederick P. Ockerman, Clerk of the County Court and the Supreme Court of the State of New York, appointed to be held in and for the said County, being courts of record having a common seal, Do Hereby Certify that the foregoing are full, true and complete copies of the originals of Petition for Writ of Error, Bond for Writ of Error, Assignment of Errors, Order for Writ of Error, and of the endorsements thereon, duly filed in my office on the 9th day of April, 1923, and now remaining on file therein.

I further certify that the foregoing proof of service of the said papers and of the annexed citation is a duplicate original of proof

of service of said papers and the endorsements thereon filed in my office at date hereof and now remaining on file therein.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said county and courts at the City of Binghamton, N. Y. this 7th day of May, 1923.

F. P. Ockerman, Clerk. [Seal of Broome County, in the State of New York.]

[fols. 183 & 184] CITATION AND SERVICE—Filed May 7, 1923

UNITED STATES OF AMERICA, *ss:*

To William H. Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of New York in and for the County of Broome, wherein Endicott Johnson Corporation is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, this sixth day of April, in the year of our Lord one thousand nine hundred and twenty-three.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

[fol. 185] [File endorsement omitted.]

[fols. 186 & 187] Service of Citation to William H. Smith, granted by Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, in an action wherein Endicott Johnson Corporation is Plaintiff in Error, the original of which Citation was filed in the office of the Clerk of the Supreme Court in and for the County of Broome on the 9th day of April, 1923, is acknowledged this 9th day of April, 1923.

Moe Goldstein, Attorney for William H. Smith.

[fol. 188] [File endorsement omitted.]

[fol. 189] CLERK'S CERTIFICATE

STATE OF NEW YORK,
Broome County Clerk's Office, ss:

I, Frederick P. Ockerman, Clerk of the said County, and Clerk of the County Court and the Supreme Court of the State of New York appointed to be held in and for the said County, being Courts of record having a common seal, Do hereby certify that the foregoing are true and correct copies of the original Citation filed in my office on the 9th day of April, 1923, and of Acknowledgment of Service

thereof, filed in my office on the 7th day of May, 1923, and of all thereof, together with the endorsements thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said County and Courts at the City of Binghamton, this 7th day of May, 1923.

F. P. Ockerman, Clerk. [Seal of Broome County, in the State of New York.]

[fol. 190] IN NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT

Come now the defendant, Endicott Johnson Corporation, by Maurice E. Page, its attorney, and the plaintiff, William H. Smith, by Moe Goldstein, his attorney, in pursuance to Rule 8 of the Supreme Court of the United States, and for the purpose of enabling the clerk to prepare the record on Writ of Error herein to the Supreme Court of the United States, hereby requests the clerk to incorporate the portions of the record in the transcript as are hereafter indicated.

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We hereby agree that the above and foregoing præcipe is correct; that the records, documents, papers, and proceedings therein set forth are sufficient for a complete record in this cause on a Writ of Error to the Supreme Court of the United States, and we hereby adopt the foregoing as a list designated by each of the parties to this cause to complete the said transcript, and each of the parties hereto hereby waives the issuance and service of notice upon the other and agrees [fols. 192 & 193] that the said præcipe shall be obeyed by and acted upon by the clerk as fully and to all intents and purposes in the same manner as if said præcipe had been duly filed and a true copy thereof duly served.

Dated, May 3, 1923.

Maurice E. Page, Attorney for Endicott Johnson Corporation, Plaintiff in Error (Defendant Below). Moe Goldstein, Attorney for William H. Smith, Defendant in Error (Plaintiff Below).

[fol. 194] [File endorsement omitted.]

[fol. 195] CERTIFICATE OF LODGMENT

STATE OF NEW YORK,
Broome County Clerk's Office, ss:

I, Frederick P. Ockerman, Clerk of the said County and Clerk of the County Court and the Supreme Court of the State of New York, appointed to be held in and for the said County, being Courts of record having a common seal,

Do hereby certify that there was lodged with me as such clerk on the 7th day of April, in the above entitled cause,

1. Original Bond for Appeal, of which a copy is herein set forth.
2. Original Writ of Error as herein set forth, and two copies thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said County and Courts at the City of Binghamton this 7th day of May, 1923.

F. P. Ockerman, Clerk. [Seal of Broome County, in the State of New York.]

[fol. 196] UNITED STATES OF AMERICA, *ss:*

SUPREME COURT OF THE STATE OF NEW YORK

RETURN ON WRIT

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same, as designated by the foregoing Stipulation and Præcipe, a duplicate original of which was filed in my office at date hereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of the State of New York in and for the County of Broome in the City of Binghamton, this 7th day of May, 1923.

F. P. Ockerman, Clerk of the Supreme Court. [Seal of Broome County, in the State of New York.]

[fol. 197] [File endorsement omitted.]

Endorsed on cover: File No. 29,611. New York Supreme Court. Term No. 327. Endicott Johnson Corporation, plaintiff in error, vs. William H. Smith. Filed May 9th, 1923. File No. 29,611.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1923

No. 327

ENDICOTT JOHNSON CORPORATION
Plaintiff in Error

vs.

WILLIAM H. SMITH
Defendant in Error

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF of PLAINTIFF IN ERROR

STATEMENT

This action was originally instituted in the Supreme Court of the State of New York in and for the County of Broome by William H. Smith as plaintiff (Defendant in Error here) against Endicott Johnson Corporation as defendant (Plaintiff in Error here) to recover judgment for the sum of $97.87 with interest and costs claimed to be due from Endicott Johnson Corporation because of its failure to pay over to the Sheriff of Broome County ten per cent of the wages of Clinton L. Ogden, Bert E. Lindsley and Charles W. Clark as directed in three several garnishee executions issued against

them respectively under certain provisions of Section 1391 of the Code of Civil Procedure of the State of New York and served upon said Endicott Johnson Corporation in respect to actions in which judgments had been recovered against said Ogden, Lindsley and Clark respectively, of which said judgments, together with all rights under said executions the said William H. Smith was the owner. The law for the garnishment of wages was contained in Section 1391 of the Code of Civil Procedure of the State of New York and was re-enacted as Section 684 of the Civil Practice Act.

The Garnishee Law.

For convenience of reference the parts thereof relevant to this case are as follows:

> *"Levy upon earnings or income of judgment debtor. 1.* Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor, and upon satisfactory proof of such facts by affidavits or otherwise the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice must grant an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or

profits, of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits, due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided.

* * * *

"*2.* It shall be the duty of any person or corporation, municipal or otherwise to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness, to pay over to the officer presenting the same such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied, and such payment shall be a bar to any action therefor by any such judgment debtor.

"*3.* If such person or corporation, municipal or otherwise, to whom said execution shall be presented, shall fail or refuse to pay over to said officer presenting said execution the percentage of said indebtedness, he or it

shall be liable to an action therefor by the judgment creditor named in such execution and the amount so recovered by such judgment creditor shall be applied towards the payment of such execution."

In the trial court, all questions of fact were settled by the trial and decisions of the court, leaving questions of law only to be decided here. The facts in sequence which were the basis for the action as brought in the trial court are briefly summarized as follows:

Said Ogden was indebted to one Fred A. Shaw et al.; said Lindsley, to one Austin; and said Clark, to said William H. Smith. Said respective creditors procured judgments against their respective debtors and issued thereon property executions which were returned unsatisfied; separate orders for garnishee executions against the wages of said debtors respectively were granted and such executions issued; no notice of the application for any order or of its entry or of the issuance and service of an execution thereunder was given to the debtor affected thereby; the respective executions and copies of the orders were served upon Endicott Johnson Corporation, in whose employ each of the debtors was; no part of the wages of any of the said debtors was paid over to the sheriff.

Said debtors respectively continued in the employ of the corporation and after the unpaid weekly installments as to each debtor aggregated the amount specified in the execution relating thereto said William H. Smith, who had become the owner of said judgments and of all rights under said execution, brought suit against the employer under the provisions of the garnishee law and recovered judgment.

All questions of fact and all questions as to regularity and sufficiency of proceedings down to return of property execution have been conceded or are deemed settled by the courts below.

The validity of the law for garnishee executions is denied, upon the following grounds, as set forth in the Answer of the defendant below, (Record, fols. 19-21; 24-26; 27-29):

> • • • "That the provisions of Section 1391 of the Code of Civil Procedure, under which the so-called garnishee execution referred to in the complaint was issued, and the laws containing the same are unconstitutional and that proceedings thereunder are null, void and of no effect; that the said law and all proceedings thereunder are unconstitutional and contrary to the provisions of the constitution of the United States and of the State of New York for the following reasons, to wit:
>
> "(*a*) That there is no general or specific authority contained in the constitution of the State of New York for the enactment of laws for the issuance of executions against the wages, earnings, salary or income of judgment debtors such as are set out in Section 1391 of the Code of Civil Procedure and such laws are in derogation of the Common Law.
>
> "(*b*) That said laws deprive the judgment debtor against whose wages a garnishee execution is issued of rights and privileges secured to citizens by the law of the land, and of his property without due process of law and without notice, in violation of the Fourteenth Amendment to the constitution of the United

States and in violation of Section 1 and Section 6 of Article 1 of the constitution of the State of New York.

"(c) That in their execution they operate unjustly, inequitably, and unequally as to different persons in that allowance is not made for varying requirements as to necessary family expenses in cases of differen individuals, arising from sickness, large number of dependents, loss of time and the like.

"(d) That the said provisions of law in their execution and application make no allowance for increased cost of living and decreased purchasing power of money and thereby cause such hardship and deprivation of the necessities of life as to render the enforcement of such execution and operation thereof against public policy.

"(e) That the enforcement of executions under said provisions of law modify and violate contracts between employer and employee without the consent of the contracting parties and without due notice or due process of law.

"(f) That the appropriation of 10 per cent of a weekly wage of $12.00 or more to the payment of executions against the wages of judgment debtors operates inequitably and against public policy as to persons whose weekly wages are from $12.00 to $13.31 both

inclusive, and unequally in connection with persons whose wages are below $12.00 or above $13.31 in that the deduction of 10% in such cases leaves for the judgment debtor less than the sum of $11.99 which amount the said law actually or presumptively makes exempt, and in effect declares necessary for living expenses."

The trial court decided in favor of the plaintiff and judgment was entered against the defendant,—plaintiff in error here (Record, Fol. 44). An appeal was taken to the Appellate Division, Third Department of the Supreme Court of the State of New York and the judgment of the trial court was affirmed (Fol. 138). An appeal was then taken to the Court of Appeals of the State of New York where the judgment was affirmed, whereupon all proceedings were remitted to the Supreme Court. (Return Fols. 148, 149). The case came to this court upon writ of error to the Supreme Court of the State of New York (Record, Fol. 175).

The assignments of error contained in the proceedings for writ of error as grounds for reversal of the judgment of the Supreme Court of the State of New York are as follows:

I. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the law for

the garnishment of wages, under which the execution was issued is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States of America.

II. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Request to Find that the said garnishee law under which said execution issued is contrary to public policy and void.

III. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred for the same reasons and each thereof in finding as a Conclusion of Law that the defendant was indebted to the plaintiff in the sum of $40.03 with $3.88 interest from January 25th, 1920, making a total of $43.91 upon the first cause of action; and that the defendant was indebted to the plaintiff in the sum of $32.16 with $1.80 interest from July 24th, 1920, making a total sum of $33.96 upon the second cause of action in said complaint; and that the defendant was indebted to the plaintiff in the sum of $41.47 with $2.35 interest from April 31, 1920, making a total sum of $43.82 upon the third cause of action set forth in said complaint, making a total aggregate sum of $121.69, and that the plaintiff (defendant in error herein), is entitled to recover that sum from the defendant (plaintiff in error herein), and that judgment be directed accordingly, together with costs of the action, in that by finding such Conclusion of Law, it in effect, held that the garnishee law was not unconsti-

tutional as alleged in the answer of the defendant (plaintiff in error herein).

IV. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome erred for the same reasons and each thereof in granting an order directing judgment for the plaintiff (defendant in error, herein).

V. The Supreme Court of the State of New York in and for the County of Broome erred in refusing to dismiss the complaint for the same reasons, and each thereof.

VI. The Appellate Division of the State of New York in and for the Third Department, erred in refusing to direct a dismissal of the complaint in the action below for the same reasons, and each thereof.

VII. The Appellate Division of the Supreme Court of the State of New York in and for the Third Department, erred in affirming judgment of the Supreme Court of the State of New York for the County of Broome hereinbefore referred to, for the same reasons and each thereof.

VIII. The Court of Appeals of the State of New York erred in not directing a dismissal of the complaint in the court below, for the same reasons and each thereof.

IX. The Court of Appeals of the State of New York erred in directing that the said judgment of the court below hereinbefore referred to be affirmed with costs, for the same reasons and each thereof.

The said assignments of error may be summarized as follows:

The Trial court erred in that it did not as matter of law dismiss the complaint and direct judgment for the defendant,

First, because the said garnishee law is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Second, because said law is contrary to public policy and therefore void.

Each of the appellate courts erred in that it did not for the same reasons reverse the judgment of the court below.

ARGUMENT

The foregoing assignments of error and the questions arising in connection therewith will be presented under the following propositions:

First: The New York law providing for garnishment of wages is repugnant to the Fourteenth Amendment to the Constitution of the United States.

Second: The law in question for garnishment of wages is contrary to public policy and void.

Third: Plaintiff in error may properly question the constitutionality of the New York garnishee law.

Fourth: A garnishee execution should be deemed a new proceeding, requiring notice to all parties whose rights will be affected, not only from the nature of this proceeding itself, but also from its analogy to similar proceedings for like purposes.

I

The New York Law Providing for Garnishment of Wages is Repugnant to the Fourteenth Amendment to the Constitution of the United States.

The garnishee law was embodied in that part of Section 1391 of the former Code of Civil Procedure of the State of New York which is now Section 684 of the Civil Practice Act. The parts of the law which are material for discussion of this case in this court are set forth on pages 2 to 4 of this brief.

The due process clause of the Fourteenth Amendment is contained in the following excerpt:

"Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within this jurisdiction the equal protection of the laws."

"Due process of law" and "Law of the land" are the same in meaning.

See, Davidson v. New Orleans, 96 U. S., 97.

— — — — —

"By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not law of the land."

Daniel Webster in the Dartmouth College Case (4 Wheaton, 581).

— — — — —

"A corporation is a person within the provisions of the due process clause."

Santa Clara Co. v. Southern Pacific Ry., 118 U. S., 394, (1886).

1. General Definition of Due Process of Law.

"The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are intended to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the Legislative as well as on the executive and judicial powers of the government and can not be so construed

as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be two-fold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this Country."

Murray v. Hoboken Land Co., 18 Howard 272, 276, (1855).

In *Hagar v. Reclamation Dist.,* 111 U. S., 701 708, (1883), the Court defined due process of law as follows:

"It is sufficient to observe here that by 'due process of law' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law: It must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause, therefore means that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

"Due process of law simply requires that a party shall be properly brought into Court and shall there have an opportunity to prove any

fact which, according to the constitution and the usages of the common law would be a protection to him or his property."

People v. Supervisors of the County of Essex, 70 N. Y., 228, (1877).

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard by testimony or otherwise and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed agaist him this is not due process of law."

Ives v. South Buffalo Ry. Co., 201 N. Y., 271, 293 (1911).

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."

Westervelt v. Gregg, 12 N. Y., 202, 209, (1854).

In the case of *Ochoa v. Hermandez,* 230 U. S., 139, at 161, (1912) the Court speaking through Mr. Justice Pitney, said:

"Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

2. Due process of law requires certain requisites of procedure which are denied by the New York Garnishee Law.

A. Notice: The statute expressly provides that the wages of the judgment debtor may be taken *without* notice.

> "The judgment creditor may apply to the Court in which said judgment was recovered or the Court having jurisdiction of the same *without notice* to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the Court, if a court not of record, a judge or justice thereof, *must issue*, or if a Court of record, a judge or justice *must grant* an order directing that an execution issue against the wages, debts, earnings salary * * * of said judgment debtor." (Italics ours).
>
> Code of Civil Procedure, Sec. 1391.
>
> Civil Practice Act, Sec. 684, Subd. 1.

Language could not be drafted more clearly in defiance of the right to notice guaranteed by the due process clause of the Fourteenth Amendment. Without such a notice the taking of property in the form of wages by the judgment-creditor is confiscation and the Statute, (Section 1391 of the Code of Civil Procedure) authorizing such a taking should be held unconstitutional.

In *Stuart v. Palmer,* 74 N. Y., 183, 188, (1878), the Court said of a law authorizing assessments for street improvements upon abutting land owners without notice:

> "I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owner of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing.

The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it but by what may, by its authority be done. *The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.*" (Italics ours).

This was said of a tax law where property was being taken for a public purpose. If notice is essential in such a case then *a fortiori* is it requisite when property is being taken to satisfy a private debt.

In the same case (*Stuart v. Palmer*), the Court said further, (p. 191):

"No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature can not do nor authorize to be done. 'Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature (*Weimer v. Bruenbury*, 30 Mich., 201). This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

In *Remsen et al. v. Wheeler*, 105 N. Y., 573, 579, (1887), the Court says:

"Therefore, in reference to the imposition of these assessments, as in reference to the imposition of other assessments and taxes, the lot owners were entitled at some stage of the proceeding to a notice and an opportunity to

be heard; and unless the law gave them the right to notice and an opportunity to be heard before the board which was authorized to impose the assessment, it was unconstitutional and void for the reason stated in *Stuart v. Palmer*, 74 N. Y., 183."

B. Hearing: Akin to notice is the right guaranteed by Due Process of Law that no one shall be deprived of life, liberty or property without a hearing.

"The Legislature has the right to take away a particular form of remedy, or to give a new one. What is required of such legislation is, that there must be hearing before condemnation, and judgment before dispossession. *Due process of law requires, that a party shall be properly brought into Court, and that he shall have an opportunity when there, to prove any fact which according to the constitution and the usages of the common law would be a protection to him or his property.*" (Italics ours).

People v. Supervisors of the County of Essex, 70 N. Y., 234.

People v. Kempner, 154 App. Div., (N. Y.) 674, (1913).

"It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law with this * * *."

Stuart v. Palmer, 74 N. Y., 191.

"Forfeiture of rights and properties cannot be adjudged by Legislative Acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law."

Cooley, Constitutional Limitations, page 444.

3. Due process of law requires that property shall not be arbitrarily taken from one and given to another.

"It cannot be the subject of doubt that an act of the legislature which provides for an involuntary transfer of property from one person to another, without due process of law, whether with or without compensation, violates the principles of the fundamental law whatever may be the pretext upon which it is founded."

Gilman v. Tucker, 128 N. Y., 190, 199, (1891).

"I think these decisions should be regarded as having settled that point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made."

Embury v. Conner, 3 N. Y., 511, 517, (1850).

"It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A and transfer it to B they can take A himself, and either shut him in prison or put him to death" *Taylor v. Porter,* 4 Hill, 146; *Rockwell v. Nearing,* 35 N. Y., 302, 306 (1866).

4. Due process of Law guarantees freedom of Contract:

"It has accordingly been everywhere held that liberty as that term is used in the Constitution means not only freedom of the citizen

from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose subject only to the restraints necessary to secure the common welfare. * * * The right of property, preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode or by following any lawful industrial pursuit. * * * *The property which each one has in his own labor is the common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.* In the Fororer case we said: *'The privilege of contracting is both a liberty and a property right and if A is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law and which B, C and D are still allowed by the law to enjoy it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.'"* (Italics ours).

Bracewell v. People, 147 Ill., 66, 71 (1893).

A. The garnishee law subverts contracts between employer and employee. When a contract has been made by which the employer expressly or impliedly agrees to pay the employee stated sums or wages at stated rates for specified periods the granting of an order for an execution against wages, and the issuance of such execution whereby a third party ostensibly becomes entitled to take a percentage of those wages arbitrarily without

notice to employer or employee or an opportunity for either of them to be heard impairs the obligation of the contract, alters its effect and so deprives employer and employee of freedom of contract.

Justice requires that the employer should not be put to the inconvenience and expense of setting apart each week ten per centum of the earnings of each employee whose wages or salary has been garnisheed and of accounting to the sheriff from time to time for the sums of money thus withheld. In a corporation the size of the plaintiff in error with approximately 16,000 employees, additional clerks and records would be necessary for this purpose. The law makes no provision for the payment of the expense of the extra clerical work and accounting necessitated by it and it is not an item of expense which the employer should be asked to bear.

B. The debtor has a legal right to insist that a claim against him shall not be split without his consent.

> "The authorities that are cited hold simply that a creditor cannot split up a single cause of action without the consent of the debtor.
>
> "The reason for this rule is that to permit a cause of action to be divided would subject the debtor to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract and to decline any assignment by which it may be broken into fragments" (*Mandeville v. Welch*, 5 Wheat., 277).
>
> Whittemore v. Judd Linseed and Sperm Oil Co., 124 N. Y., 565, 577, (1891).

"Another rule of the common law is that a debt or entire claim arising out of a single transaction cannot, at the will of the creditor and without the consent of the debtor, be split up by assignment and several suits maintained on it. Since a debtor has a right to pay his debts *in solido*, he has the privilege of refusing to be subjected to suits by several claimants, and no notice of an assignment of part of a debt can destroy this right of the original debtor without his consent."

2 Ruling Case Law, 619.

C. There are many statutes in the various states placing restrictions upon the assignment of wages. The purpose of most of these statutes is to protect the family of the employee from deprivation of the necessaries of life as a result of the advantage sometimes taken of the employee by unscrupulous tradesman. Other statutes of this nature are for the purpose of protecting the employer from the inconvenience above mentioned.

Indiana has a statute which forbids altogether the assignment of future earnings of an employee. This statute was held constitutional and not an unreasonable restraint upon the liberty of the citizen and not to deprive the citizen of his property without due process of law.

In *International Text Book Co. v. Weissinger*, 160 Ind., 349, (1902). The court said:

"A large proportion of the persons affected by these statutes of liberty are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessaries of life, suffering, inability to meet just obligations to others,

and, in many cases may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesman, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to substitute for them an inadequate contract, is often very great. Such assignment would, in many cases, leave the employee or the wage-earner without present or future means of support. By removing the strongest incentive to faithful service—the expectation of pecuniary reward in the near future, their effect would be alike injurious to the employer and to his employee. It is clear that the object of the Act of 1899, *supra,* was to secure protection of wage-earners from oppression, extortion or fraud on the part of others and from the consequence of their own weakness, folly or improvidence. We cannot say that no just ground existed for such legislative interference for so commendable a purpose."

See also

Mutual Loan Co. v. Martell, 200 Mass., 482 (1908); affirmed 222 U. S., 225 and cases cited in 28 L. R. A. (N. S., 1108).

5. Authorities except the courts of the State of New York specifically hold that laws such as the garnishee law in question proceed without due process of law.

The State of New Jersey in the year 1916 passed a Statute (Pamph. L. 1916, p. 242, ch., 113) which provides for the issuing of an execution by order of a judge or court, upon an unsatisfied judgment after the return of a property execution unsatisfied "where any wages, debts, earnings,

salary, income from trust funds or profits are due and owing to the judgment debtor," or "shall thereafter become due and owing to him to the amount of $18.00 or more per week."

The law provides for a garnishee execution against 10% of wages provided they are $18.00 per week or more unless the income of the judgment debtor shall exceed $1000 per year in which case the percentage subject to garnishment rests in the discretion of the judge granting the garnishee order. It will be noticed that the language of this law is practically the same as the language of Section 1391 of the Code of Civil Procedure of New York and that the chief differences between the two statutes are that in the New Jersey Law the earnings of the judgment debtor must be at least $18.00 before any portion of them can be garnished whereas under the New York Law $12.00 a week is sufficient for garnishment, and also that the New Jersey statute gives the judge power in his discretion to issue an order authorizing execution against a larger portion than 10% of the wages of the judgment debtor in cases where his income exceeds $1000 per year.

In the case of *Trapp v. Brown* (91 N. J. Law, 481), decided June 6, 1918, the plaintiff obtained a judgment against the defendant for $710.00 damages, besides costs. An execution having been returned unsatisfied a petition was presented to the justice of the court *ex parte* showing that defendant owned hotel property in Atlantic City from which she received rental of $4250 per year and that there was an installment of rent for said property which was unpaid. The defendant asked the court for an order directing the issuance of an

execution against any sum in the hands of the agents collecting the rents due the defendant from the tenant. An order was granted providing for the issuance of a garnishee execution against the debts and earnings then due or thereafter to become due from said property to the full amount of the judgment until the judgment with costs should be paid. The defendant moved that the order be vacated. The case came before the New Jersey Supreme Court on that motion. The court said:

> *"The act itself is in derogation of the procedure at common law and takes from a debtor and his creditors regardless of priorities, property in invitum and without hearing or a notice thereof to creditors. The procedure, therefore must be in strict compliance with the express requirements of the statute, and no intendment will be made to enable the court or a judge to assume jurisdiction in the absence of the jurisdictional facts properly evidenced. * * * The result may be that upon a mere ex parte application of this nature, without notice or hearing to any party in interest, the vested rights of prior lienors may be eliminated and in effect subverted * * * In such a situation, a party whose interests would be injuriously affected might well insist that there was an absence of due process of law and successfully invoke that provision of the 14th Amendment of the federal constitution as a barrier to the deprivation of his rights"* (Italics ours).

Trapp v. Brown, 91 N. J. L., 481, citing Provident Ins. etc., v. Mayor, etc., of New Jersey (113 U. S., 506); Coe v. Armour Fertilizer Works, (237 *id.*, 413).

On appeal from the judgment that the execution be set aside the Court of Errors and Appeals of New Jersey unanimously affirmed the decision of the lower Court (93 N. J. Law, 171).

Under the subject of *Executions in Corpus Juris,* Volume 23, is a special section numbered 1099½ and entitled "Special Executions against wages and other Credits," which deals with proceedings authorizing executions for the garnishment of wages earned and to be earned in the future without notice to the judgment debtor or an opportunity for a hearing. The Statutes set forth in this Section and the cases which have been compiled and are cited thereunder by the editors of *Corpus Juris* are confined to the States of New York and New Jersey, the statute of no other state being referred to nor any intimation being given in said section that any other state has a law similar in nature to the garnishee laws of New York and New Jersey. The attorney for plaintiff in error has made a careful examination of the Statutes of many jurisdictions and has failed to discover any other states than New York and New Jersey which have a garnishee law authorizing the taking of wages of a judgment debtor or any portion thereof without notice to the judgment debtor or an opportunity given him for a hearing. It appears therefore that New York and New Jersey are alone in this extraordinary, inequitable and unjust method of attachment of wages.

> *"Such a statute is in derogation of the procedure at common law, and takes from the debtor without notice and without a hearing property which, except for the statute, is exempt from execution."*

23 Corpus Juris, Sec. 1099½.

The section in question should be construed in favor of the judgment debtor and employer.

The following statement made of the process of attachment is equally applicable to the instant case:

> "Owing to the statutory origin and harsh nature of this remedy the Section in question should be construed in accordance with the general rule applicable to statutes in derogation of the common law strictly in favor of those against whom it may be employed (*Sharp v. Speir,* 4 Hill, 76, 86)."
>
> Penoyer v. Kelsey, 150 N. Y., 77, 80, (1896).

6. The vital questions involved in this case do not seem to have been carefully considered by the New York Courts.

Mr. Justice McCann, before whom this case was tried, stated in his opinion (fol. 42), and Mr. Justice VanKirk, writing for the Appellate Division, of the New York Supreme Court, Third Department, in the case of *William H. Smith v. Endicott Johnson Corporation* (fol. 50), also stated that the question of validity and constitutionality of the act had been sustained by the Court of Appeals and as authority therefor cited the cases of:

> Laird v. Carton, 196 N. Y., 169 (October, 1909);
>
> Brearley School v. Ward, 201 N. Y., 358 (March, 1911).

These are the only two cases relating to the law for garnishee executions which have reached the Court of Appeals in the State of New York, except the case at bar.

We do not think the Court of Appeals gave these cases as broad a scope as stated by Justice McCann and by Mr. Justice VanKirk in the opinions written by them respectively.

The case of *Laird v. Carton* came to the Court of Appeals by permission of the Appellate Division of the Supreme Court in the First Judicial Department, upon two certified questions, of which the second was a question as to the nature of the earnings and is immaterial here.

In the opinion which was written by Mr. Justice Willard Bartlett, he says (p. 171):

> "The first question certified by the Appellate Division is whether such an execution, namely, an execution against the wages, debts, earnings or salary, can lawfully be issued upon a judgment recovered *before* September 1, 1908. Or was the amendment designed to authorize such execution only upon judgment which should be recovered *after* that date."

It is submitted that in neither of these cases did the Court of Appeals pass upon the question of the constitutionality of the garnishee law itself, but that in both the question at issue and the only question decided was whether or not the garnishee law could be given a retroactive effect.

The opinion of Mr. Justice Bartlett relating to the question certified, discussed whether it was the the intention of the legislature to make the amendment retroactive, that is, applicable to judgments recovered *before* the amendment came into effect, and if so, whether such retroactive operation was valid.

These questions were the only questions considered in the Points of counsel in the argument of the case.

Mr. Justice Bartlett, after referring in his opinion to conflicting cases in the lower courts, says (p. 172):

> "We have reached the same conclusion as that arrived at by Mr. Justice Jenks in that case (*Meyers v. Moran,* 113 App. Div., (N. Y.), 427), to wit: that under Section 1391 of the Code of Civil Procedure, as amended in 1908, the Court may allow an execution to issue against wages, although judgment upon which the execution was sought was rendered before the enactment of the amendment."

Mr. Justice Bartlett, after stating that the amendment to Section 1391, Code of Civil Procedure, like the whole section, was a statute dealing with a legal remedy, says (p. 172):

> "As has been pointed out, the phraseology of the amendment does not require us to construe it as applicable only to future judgments. It matters not that when the judgment was recovered an execution could not issue thereon against wages, earnings or salary; it is enough that such an execution has subsequently been authorized. The statutory authorization for its issuance *does not impair the obligation of any contract or affect any vested right;* it merely furnished the judgment creditor with a broader and more effective remedy than the law gave him before. *To this there is no constitutional objection."* (Italics ours).

It is to be noted that Mr. Justice Bartlett says he has reached the same conclusion as arrived at by Mr. Justice Jenks in the Appellate Division. The opinion of Mr. Justice Jenks contains the following:

"The appeal is based upon the fact that the judgment was entered before the enactment of the statute. The first point made is that if the statute be construed as retroactive, *it impairs the obligation of a contract.* A statute of exemption from an execution is not a contract between the state and the judgment debtor." (Italics ours).

The question of unconstitutionality of the law for the garnishment of wages upon the grounds of lack of due process of law, or lack of notice, or lack of opportunity for hearing, or as being against public policy was not passed upon or even considered in the case of *Laird v. Carton.*

The Points of the counsel in that case did not raise any question as to the unconstitutionality of the law upon those grounds or upon any other grounds, but on the other hand, seem to admit or assume that it was constitutional; counsel addresses his entire argument to the question that the law should not relate to judgments recovered before the law was in effect, *because* it impaired the obligations of contracts, as referred to in the opinion of Mr. Justice Jenks quoted above.

It seems to us that all that was actually decided in the case of *Laird v. Carton* was that the retroactive operation of the law did not violate the obligation of any contract, and that it was not unconstitutional on that account. In any event, that was the only ground upon which the invalidity of the law was attacked.

Upon the examination of all cases in the New York Official Reports that cite the case of *Laird v. Carton,* as listed in Shepard's New York Court of Appeals Citations, it is found that with one excep-

tion all relate to the construction or interpretation of laws or statutes as to their retroactive operation; the one exception relates to the measure of commissions of a judgment debtor. Not one of the cases refers to the general proposition of the constitutionality or unconstitutionality of the law authorizing garnishee executions, upon the grounds claimed in this case.

In the case of *Brearly School v. Ward*, substantially the same question was certified to and considered by the Court of Appeals, except that the question related to income from a trust fund. Prior to the amendment of 1908 income from trust funds was not subject to garnishment, but was made so by that amendment.

The only question in the case was whether such execution could be issued against the income of a trust created *before* the amendment, upon a judgment recovered *after* the amendment. That this was the only question involved is evidenced by the statement contained in the prevailing opinion in that case that, *"The appellant concedes* that Section 1391 as thus amended is applicable to the income from trusts which have come into being since the amendment" (p. 361).

II.

The Law in question for garnishment of wages is contrary to public policy and void.

1. The highest and most important duty imposed upon man in organized society is the support of his family.

A. This duty has its foundation in natural law.

Upon no one but the parents should devolve the duty of caring for helpless children. They are responsible for bringing these children into the world and society should not be called upon to perform this duty.

Fortunate for the child and for the race that parental love and not obedience to legal enactments prompts this care. Parents that do not care for their children are called unnatural. No exception to this is found in the history of civilized peoples. Were it otherwise, the race would soon become extinct. The same law prevails through all stages and phases of animal life, from the lowest to the highest.

B. Laws in force in this state as well as in every civilized nation, adopted to aid and compel the performance of this duty, as well as to punish the wilful nonperformance thereof, are further evidence of this exalted duty.

(*1*) Certain necessary articles of food, clothing, bedding and furniture, with allowance for needs for a specified future period are exempt from levy and execution under New York laws, (Sections 1390 and 1391, Code of Civil Procedure; Section 665, Civil Practice Act). Many of these exemptions have been found in the laws of the colony and State of New York for nearly two hundred years. These exemptions are made not only in recognition of the duty of the householder to support his family and his absolute right to have reasonable ways and means of fulfilling this duty without molestation from creditors, but also the absolute right of his wife and children to live in comfort and peace.

"From this origin and beginning through a series of amendments and additions has grown the present statutes upon the subject of exemptions for the benefit of widows and minor children, upon the one hand, and from executions against judgment debtors upon the other. An examination of the various enactments upon this subject will disclose that, while the policy of referring to the exemption articles enumerated in the one statute for the purpose of disclosing what were exempted under the other did not long continue, the statutes upon the two subjects from thenceforth grew up together, each embracing and exempted the same articles so far as warranted by the circumstances, and carrying out the same general policy—the protection of the family."

Matter of Keough, 42 Misc., (N. Y.), 394, (1904).

(2) In proceedings supplementary to execution which can be instituted only after the issuance of an execution against the property, and are not usually instituted until after the return of such execution unsatisfied, there is a special provision that the earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding cannot be reached when it is made to appear by his oath or otherwise that those earnings are necessary for the use of a family wholly or partly supported by his labor.

New York Code of Civil Procedure, Sec. 2463.

New York Civil Practice Act, Sec. 777.

In such proceedings, disposal of such earnings necessary for the support of debtor's family after service on the judgment debtor of an order for

examination with its usual accompanying injunction against disposal of his property is not in violation of such injunction order and the debtor cannot be adjudged guilty of contempt of Court therefor.

Hancock v. Sears, 93 N. Y., 79.

Murray Hill Co. v. Kuhnle, 58 Misc., (N. Y.), 313, (1908).

Referring to Section 2463 of the New York Code of Civil Procedure in the case of *Matter of the Trustees of the Board of Publication and Sabbath School Work, Judgment Creditor, for the examination of William J. Harsha, defendant and Judgment debtor,* 22 Misc., (N. Y.), 645, (1898), the Court said:

> "The intent of the legislature is plain. Debtor's duty to his family is recognized so far that, if he has a family wholly or partly supported by his labor, he may if necessary, always have sixty days back earnings exempted and in *Miller against Hooper,* 19 Hun, (N. Y.), 394, it was held that this was a humane provision and should be liberally construed in favor of the debtor."

(*3*) In the so-called judgment-creditor's action which likewise cannot be begun until the return of an execution wholly or partly unsatisfied, there is also the same provision that the earnings during such period of sixty days prior to the commencement of the proceedings cannot be reached if the judgment debtor shows that such earnings are necessary for the use of a family which is wholly or partly supported by his labor.

New York Code of Civil Procedure, Sec. 1879.

New York Civil Practice Act, Sec. 1196.

These provisions of law were made for the protection of the family and have been in force in this state for half a century or more.

(*4*) In New York failure of a husband to provide for his wife, or of parents to provide for their children makes them subject to specific liabilities and penalties.

(*a*) For failure of husband to provide for his wife the law of this state gives the wife a right of action for separation, while in many other states such failure is deemed and is made a sufficient ground for an absolute divorce.

(*b*) Persons who actually abandon their wives or children without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means, are disorderly persons (New York Code of Criminal Procedure, Sec. 899).

Summary proceedings may be taken to compel a husband to support his wife and family, and security therefor may be demanded and if not furnished, he may be committed (New York Code of Criminal Procedure, Secs. 899-901).

(*c*) A person who wilfully omits without lawful excuse to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor is guilty of a misdeameanor. (Section 482, New York Penal Law).

(*d*) A parent, or other person, charged with the care or custody for nurture or education of a child under the age of sixteen years, who abandons

the child under destitute circumstances and wilfully omits to furnish necessary and proper food, clothing or shelter, for such child, is guilty of felony (Section 480, New York Penal Law).

(*c*) A parent, or other person having the care or custody for nurture or education of a child under fourteen years, who deserts a child in any place with intent wholly to abandon it, is punishable by imprisonment in a state prison for not more than seven years (Section 481, New York Penal Law).

2. The law of this sate garnisheeing future wages and earnings may deprive the debtor's family of necessaries.

A. The Court will take judicial cognizance that there are cases in which the family cannot be properly supported by the earnings of its head.

Among the factors producing such inability are:

(*1*) The family may be large, consisting of a wife and several children.

(*2*) The husband's wages may be small because of ill health, lack of strength or skill, irregularity of work and many other causes.

(*3*) There may be sickness in the family, necessitating extra expenses for medical attendance, nurse, nourishing food and domestic help.

(*4*) The cost of food and clothing may advance abnormally without corresponding advance in wages.

B. It is absurd to fix $12.00 per week, which is named in the law, as a minimum wage, of which one-tenth is sought to be taken to apply on the judgment.

As stated above, the earning power of the head of the family may be small and the family may be large; yet if he earns the bare $12.00 per week, the sum of $1.20 is to be taken by the provisions of law to apply on the execution, leaving $10.80 per week with which to pay for rent, fuel, fool and clothing, and perhaps bills of a doctor and a nurse. Whatever may be said as to its sufficiency when that amount was fixed by the amendment of 1908, it has so remained ever since—a period during which the cost of rent, fuel, food and clothing has increased from 50% to 200% and even 300% or more.

The absurdity and incongruity of the operation of the law are apparent and need no further comment.

A concrete example, based on actual facts shows its incongruity. In at least one case when a garnishee execution was served in respect to the wages of an employee of the plaintiff in error whose wages paid at the regular rate for the kind of work he was able to do were insufficient to support his large family, the plaintiff in error had been paying from funds set aside for sick and poor relief a substantial sum each week for about one year so that the wife and children might have suitable food and clothing.

C. The restrictive provisions of the law leave no latitude or discretionary power to make modifications for exceptional cases.

Under provisions of the so-called garnishee law of New York, as contained in Section 1391 of the Code of Civil Procedure and Section 684 of the Civil Practice Act, in those cases where the facts make it applicable, "the creditor may apply to the

court in which said judgment was recovered or to the court having jurisdiction of the same *without notice to the judgment debtor*, and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof *must issue*, or if a court of record, a judge or justice *must grant* an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor." (Italics ours).

The impossibility of latitude or the exercise of discretion arises from two causes:

(*1*) The application is *ex parte*,—made without notice to the judgment debtor; he knows nothing of it and has no opportunity to state to the judge or to the court what the necessities of his family are.

(*2*) No discretion is given to the judge or to the court to withhold an execution or an order therefor or to postpone its operation or to decrease the amount collectible below ten per cent authorized by the law. The language is clear and unequivocal that the judge or justice or the court *must issue* the execution, or must grant the order therefor.

3. The New York garnishee law is inconsistent with settled law of nearly all states that process can reach only property that is in existence when process is served and only choses in action that are due and is therefore contrary to public policy.

"It has been laid down as a guiding principle that the validity of process of garnishment depends upon the state of facts existing

at the time of the service of the writ (*Hancock v. Colyer*, 99 Mass., 187). Hence, some courts have asserted that an indebtedness is not subject to garnishment unless it be past due (*Davis v. Effinger*, 18 Cal., 378; *Halker v. Hennessey*, 143 Mo., 88). On this principle wages not yet due have been held not subject to garnishment (*Foster v. Singer*, 69 Wis., 392)."

12 Ruling Case Law, 779.

4. Public policy as crystallized in the laws of modern civilized nations precludes the imposition of a lien upon future earnings, especially if without notice to the debtor and in disregard to the needs of his family.

A. Public policy not only permits, but demands reasonable exemptions from execution.

(*1*) "Statutory provisions creating exemp-emptions have always been considered as founded on public policy. The right to create exemptions must reside in every state to enable it to secure its citizens from unjust and harassing litigation and to protect them in those pursuits which are necessary for the existence or the well being of the community."

11 Ruling Case Law, p. 489.

(*2*) "Exemption laws are enacted to prevent the unfortunate citizen from having all the necessaries of life swept away and to preserve for him certain things reasonably necessary to enable him to earn a livelihood for himself and family. The sole purpose of all such laws is to protect the citizens of the state from being reduced by financial misfortune to absolute want, and to encourage industry and thrift and the building up of homes by placing beyond the reach of creditors; the homestead

and such tools, implements, or appliances as a man may require to prosecute his business, whatever his walk in life or his occupation may be. *Every man, even the extravagant and improvident, owes a first duty to those immediately dependent upon him.* And so it is that the state has an interest that no citizen shall be reduced to a condition of destitution so as to be prevented from prosecuting useful industrial employments for which he may be fitted, and that families shall not be deprived by extravagance or misfortune of the shelter and comforts necessary to health and activity." (Italics ours).

11 Ruling Case Law, 491-492.

B. Waiver of exemptions is held void in most jurisdictions as contrary to public policy.

"The better reasoning and weight of authority support the proposition that a contract made at the time of incurring an indebtedness waiving the debtor's right to exemptions is contrary to public policy and invalid. The statutes which allow a debtor being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement waiving his right could be sustained. If effect should be given to such agreements, it is likely that they would be generally inserted in obligations for small demands, and in that way the policy of the law would be completely overthrown. Because of a disposition on the part of some to take undue advantage of another's extremity and because also of the readiness of men, under pressure, to make contracts which may deprive them and their families of articles

indispensable to their comfort, the legislature has most wisely interposed."

11 Ruling Case Law, 543.

C. The Constitution and Laws of other Jurisdictions forbid the taking of wages by garnishment.

(*1*) So far as we can find no state except New York and New Jersey assumes authority, by any proceeding to reach, or the advisability of attempting to reach future earnings of a worker.

In this case before this court on this appeal the right and advisability of attempting to reach future wages is honestly contested on the ground of unconstitutionality and as against public policy as hereinbefore fully set forth. In New Jersey the right and advisability of attaching future earnings of a worker is questioned by the courts of that State as fully explained and hereinbefore set forth at pages 22 to 25 of this brief.

(*2*) The Statutes of the United States distinctly prohibit the taking of earnings of seamen for debt.

"No wages due or accruing to any seaman shall be subject to attachment or arrestment."

Act March 4, 1915, Ch. 153, Sec. 12; 38 Statutes, 1169.

(See also Barnes Federal Code, Section 7555.)

"No sum exceeding $1.00 shall be recoverable from any seaman by any person for any debt contracted during the time such seaman was actually belonging to any vessel until the voyage for which the seaman was engaged was at end."

U. S. R. S. Sec. 4537, Act July 20, 1790, Ch. 29, Sec. 4.

(See also Barnes Federal Code Sec. 7556).

"Under the Statutes pertaining to garnishment of wages or salary the rule is well recognized that wages or salary not earned or due at the time of the service of the process cannot be reached.

"Thus, the wages of a seaman cannot be reached by garnishment or trustee process before the voyage on which they are earned is terminated."

20 Cyc., 1007, (Citing 12 Pick., 105).

(*3*) The Constitution of the State of Texas specifically forbids the passage of laws for the garnishment of wages of workers.

"No current wages for personal services shall ever be subject to garnishment."

Constitution of Texas, Art, 16, Par. 28.

Revised Statutes of Texas, 1895, Article 252.

Wages earned during specified periods before service of process, or in specific amounts, or both, are exempt from execution under the laws of all or nearly all of the States of the Union.

The following are some of the provisions of the laws of some of the states in relation to executions against wages as shown by a partial examination of their statutes by counsel.

(*a*) In Iowa, Kansas, Ohio, Oklahoma and Wisconsin, the earnings of workmen and wage earners are exempt from execution for a period of 90 days.

McClain's Annotated Code of Iowa, Sec. 4299.

Revised Statutes of Ohio, Par. 6489.

Revised Statutes of Oklahoma, Par. 3343, Subdv. 16.

(*b*) In New York, (under proceedings supplementary to execution and in judgment creditor's actions), in the case of householders, and in South Carolina the earnings of wage earners are exempt from execution for 60 days.

Civil Practice Act of New York, Sections 773 and 1189.

South Carolina Code, Section 317.

(*c*) The earnings of wage earners are exempt from execution for a period of 30 days in Maine, Missouri, Minnesota, Montana and Oregon.

(*d*) The earnings of wage earners are wholly exempt from execution in Georgia, Louisiana, Pennsylvania and Texas.

Code of Georgia, Sec. 3554.

Louisiana Statutes 1876, No. 79.

Pennsylvania Laws of 1845, Par. 5.

Purdon's Digest of Laws of Pennsylvania, page 1540.

Constitution of Texas, Art. 16.

Revised Statutes of Texas, 1895, Art. 252.

(*e*) Earnings of wage earners in various amounts are exempt in various states as follows:

In Nebraska, to the extent of $500.

Nebraska Code of Civil Procedure, Par. 21.

In Missouri, to the amount of $300.

Missouri Revised Statutes, 1899, Par. 3435.

In Oklahoma, to the amount of $150.

Oklahoma Revised Statutes, Par. 6489.

In Mississippi and Washington, to the amount of $100.

Statutes of Mississippi, 1880, Par. 1244.

R. & B. Code of Washington Laws, Par. 703.

D. Decisions of the courts of various states show sufficient grounds for the policy of exempting wages.

"It was the obvious purpose of this act to enable laborers and persons in public or private employment to receive from their employers compensation for their personal services without hindrance from their creditors. The miner who is paid by the ton, the mechanic who is paid by the piece, and the clerk or salesman who is paid by commissions on his sales, are as much within its protection as if they were paid by the day, week, month or year."

Hamberger v. Marcus, 157 Pa., 133, 136.

"It is not difficult to discern the reasons which influenced the legislative mind in enacting the proviso. (Pa. Act of 1845). Doubtless they meant it should operate as an exemption law for the benefit of the families of laborers and salaried officers, and quite likely they had in view besides the very inconvenience pointed out and lamented by the judge below, that of manufacturers and other large employers being harassed with attachment executions from neighboring justices of

the peace, complicating accounts, accumulating costs, and depriving them of the laborers on whom they depended, by diverting wages from the current support of the laborer's family to the paying of former debts."

Firmstone *et al.* v. Mack 49 Pa., 387, 392.

In the case of *Firmstone v. Mack* (*supra*), the right of an employee to waive the statute exempting his wages from garnishment was also before the court and the language of the court in the opinion shows the policy of the law in this respect.

"We have never decided that a debtor may repeal the proviso of the Act of 1845, and public policy pleads strongly against such a decision. If we make it, we bring on the litigation which has sprung out of our decision upon the Act of 1849—the inconvenience to employers before adverted to and the temptation to weak debtors to beggar their families in behalf of sharp and grasping creditors. We will not therefore, strain the proviso to fit it to our construction of the exemption statutes, but will leave it to its natural operation as it is expressed. The legislature having said that justices shall not attach wages, we will say that they shall not, though a particular debtor has said they may. It is to be observed that the garnishee has his rights in the premises, and he is under the Act of Assembly, but is not a party to the agreement which his laborer makes with a creditor. Why should he be annoyed and subjected to costs, his work hindered and his hands deprived of their daily bread by an agreement between others to which he was not a party, and of which he had no notice? Why should such an agreement be made a rule of law to garnishees instead of a statute which they knew of when they made their business

arrangements and employed their laborers, and which they had a right to expect would be administered as it is written?"

In Little v. Balliette, 9 Pa. Superior Court, 411, 413, the Court says:

"The Act of 1845 is frequently spoken of, for convenience sake, as an exemption law and in a sense it is such, but more broadly it is a law forbidding the taking of jurisdiction by attachment over the subject matter. It was not intended to confer a personal privilege upon laborers merely, but was enacted for the protection of their employers as well. For this reason, as well as upon grounds of public policy, it was held that the laborer could not waive its provisions, and thereby subject his employer to a liability to the expense and annoyance of attachments."

III.

Plaintiff in error may properly question the Constitutionality of the New York Garnishee Law.

1. Rights of plaintiff in error guaranteed by the Fourteenth amendment of the constitution of the United States will be violated if the judgment of the Supreme Court of the State of New York is affirmed.

A. There is a violation of its right to freely contract with its workers.

Beginning with Subdivision 4 on page 18 of this brief and continuing to page 21, it is shown that freedom of the employer and employee to contract is one of the rights guaranteed by the due process of law clause of the Federal Constitution, that a law which steps in and says to the employer,

that he cannot pay his worker the amount and at the times he had theretofore agreed to pay him, but that he must pay a portion of the agreed amount to the sheriff when he demands it for the judgment creditor, certainly leaves the employer far from free in his right to contract with his employee.

B. If an employer in New York State recognizes a garnishee execution and retains and turns over a portion of an employee's wages to satisfy the claim of a judgment creditor he does so at his peril.

The garnishee statute has been interpreted and enforced by the lower courts of New York as though it were valid. In fact, there was no other position for these courts to take until the issue of unconstitutionality upon the grounds stated in this case has been squarely raised and settled in a case which raises this issue clearly. As shown in sub-head F of General Head I of this brief, this issue does not seem to have been carefully considered by the courts in the jurisdiction where this case arose. The courts of the state of New Jersey, which is the only state except New York having such a law for garnishment of wages, clearly intimate that such law is repugnant to the due process clause of the fourteenth amendment. Until the question has been squarely presented to and has been carefully considered by the highest courts there is no safe ground that the law is constitutional nor does it create a presumption of constitutionality, for at any time when the issue of constitutionality has been properly raised, the statute may be held unconstitutional.

(*1*) An unconstitutional statute is not a law and can create no rights or duties.

In the case of *Newell v. People*, 7 N. Y., 9, 94, (1852), the court says:

"Leaving these matters without further observation, let us turn to the main question, which we are called upon to examine. The people of this state, in the exercise of their underived and sovereign authority, established a constitution. As part of the machinery of government under it, they created a Senate and an Assembly, and vested in them the legislative power of the state. The authority of the legislature is not inherent, but is entirely derived from and subordinate to the constitution. 'The constitution is the basis of legislative authority; it lies at the foundation of all law and is a rule and commission by which both legislators and judges are to proceed' (2 Dall. 304). *If, therefore, an act of the legislature is contrary to any provision of the constitution, it cannot possess the force of law. Ever since the formation of constitutional governments, this principle has on all proper occasions been asserted and enforced, by the courts, and is now one of the acknowledged maxims and fundamental rules of the law.*" (Italics ours).

In the *Case of Norton v. Shelby County*, 118 U. S. 425, (1885) in a suit brought by the owners and holders of bonds issued by the Board of Commissioners of Shelby County, Tennessee, holding office under an act which had been held by the Supreme Court of Tennessee to be unconstitutional, Mr. Justice Field made this classic statement:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Mr. Justice Chase, in *Van Antwerp v. State of New York*, 218 N. Y., 422 at 427; (1916) said, in speaking of an unconstitutional statute:

"The act of 1906, being unconstitutional, did not constitute legal authority for any act done pursuant to its terms. The respondents, in annexing and cancelling the stamps in question, destroyed their own property, and such cancellation and destruction constituted a complete loss to them and not to their customers * * * The cancellation of the stamps did not constitute a sale to the customers, nor create a legal claim that the respondents could in any way enforce against them."

"No rights may be based on, nor may any duties be imposed by an unconstitutional statute."

12 Corpus Juris, 801.

"The interpretation given to a statute or constitutional provision by a court of last resort is binding on all departments of the government, including the legislature, and a decision by such a court that a statute is unconstitutional has the effect of rendering such statute absolutely null and void, from the date of its enactment and not only from the date on which it is judically declared unconstitutional."

12 Corpus Juris, 800, Sec. 228.

"An unconstitutional law is absolutely void and therefore no law at all. It is the same as if the law had never been passed."

Cleveland v. City of Watertown, 99 Misc., (N. Y.) 66, 69, (1917).

(2) It follows from sub-point (1) that if the garnishee law at any time is held to be unconstitutional, and if the plaintiff in error had withheld any portion of the wages of its employee, or employees, and paid it to the sheriff, for the judgment creditor, it will have done so in compliance with a statute, which is then declared a nullity, a statute which is "absolutely void and no law at all." It also follows that the defendant will have retained for a judgment creditor and turned over for his benefit moneys which properly belong to the employee, and which, therefore, the employee may recover from the defendant in an action brought by him. Clearly, payments of the worker's wages made to or for a judgment creditor by the defendant can in no way relieve the defendant-employer from his duty to pay wages regularly to the employee in accordance with the contract or understanding entered into with the worker when he entered upon his employment.

Obviously, therefore, the defendant-employer has an interest in this action and should be permitted to raise objections to the constitutionality of the statute in question. If the employer does not resist the demand of the sheriff for payment of a portion of the wages garnisheed, and if in an action brought by the judgment creditor the employer does not appear and defend its rights, in what other way can it secure for itself the protection granted to it under the due process clauses of the State and Federal constitutions?

See: Second National Bank v. City of New York, 160 App. Div., 491, (1914).

It is respectfully submitted that the employer should have a clean-cut decision of this court as to its rights under the garnishee law, so that it may know, when demands are made upon it for a portion of the wages of its employees under the garnishee law, whether it may properly pay the sums demanded or must make such payment at its peril. Plaintiff in error has here a property right, and a right to contract, which is also property, both of which may not be taken from it without due process of law. It is to secure a decision of this court of last resort whether or not the method of taking this property and of impairing this contract right is due process of law under the State and Federal constitutions that the plaintiff in error has honestly and in good faith contested this matter and has raised the constitutional questions appearing in the issues of this case and set forth in this brief.

2. It is the duty of the employer to defend its employee when his constitutional rights are infringed by the operation of the garnishee law.

A. The interests of employer and employee are so close that what affects the welfare of one affects the other.

If any part of the wages of employees in excess of $12.00 per week can be reached by garnishment irrespective of the amount of such wages and of the needs of the worker's family, it is an invitation to unscrupulous tradesmen to take advantage of the employee, extending him credit for unnecessary articles sold at exorbitant prices.

Is there any question but that the garnishee law as it now operates makes for extravagance, waste and, in the end, distress on the part of the worker and his family, in whose interests society should be more concerned than in the interests of unduly eager and grasping salesmen and vendors. Once it is established that the wages of an employee may not be taken by garnishment until the employee has had an opportunity to appear before a judge or a court and state the needs of himself and his family, there will be less credit extended to working people for the exorbitant purchase price of unnecessary articles which have been induced to purchase by fluent salesmen upon flattering promises of easy terms and extended credit.

The employer has an interest in the welfare of its workers. Any policy which tends to distract them from their duties, and to impair their efficiency by cares and anxieties,-and the garnishment of wages is not among the least of these,—affects the employer financially quite as much as though the loss in efficiency caused by this extravagance had been paid for by it directly. It is submitted that this interest of the employer in the welfare of its workers and in the well being of those in the community where it conducts its business is as much property as money itself, and that the deprivation of the employer of this property, resulting from the inefficiency of its workers is as much a deprivation without due process of law as though it had been directly by confiscation.

B. The garnishee law provides that in the event of the failure of an employer to honor garnishee executions the judgment creditor may

have an action directly against the employer himself. Surely, the employer has an interest in this action as well as the worker, having been made the defendant therein by specific provision of the statute, Moreover, the employee has no notice of the garnishment of his wages until a deduction has been made therefrom by the employer in pursuance of some execution under the garnishee statute, and if the employer refuses to honor the garnishee execution, the employee has no notice even then that his rights are at stake and are being jeopardized, unless it be called to his attention voluntarily by the employer. The garnishee law expressly provides that the proceedings for garnishment of wages may be taken without notice to debtor employee and does not provide that when action has been brought against an employer for failure to honor garnishee executions the employee shall be made a party thereto or be given notice thereof. He cannot, therefore, be said to have waived any rights by reason of his failure to appear in the garnishee action and defend himself.

The Case of Duffy v. Morrissey, 82 Misc., (N. Y.) 149, (Albany County Court, 1923) contains the following:

"In the case of Chicago & Alton R. R. Co., appellant, v. Ragland, respondent, 84 Ill. 375, the Court says:

> "A judgment was recovered against appellant, which was paid, appellant failing to claim, for the benefit of its employees, the exemption granted by this section. It is insisted, appellant had no concern with this matter, and their paymaster had no knowledge of the domestic relations of appellee.

"It appears, however, that other employees of the railroad company did know the fact, and it was quite easy for all the officers of the company having active connection with all the employees, to know it. It is a very easy matter, attended with no trouble or expense, to make the inquiry of everyone, when employed, if he has a family and residing with it, and to enter on the payroll the word "family." We are inclined to think a railroad company should take an interest in the well-being of all its employees, and concede to them and obtain for them all the advantages the law gives them. They are generally poor men, not well informed of their rights, and it would not be in derogation of the higher position occupied by the corporation, to save and protect their interests in all cases, especially when it can be done without trouble and expense to the corporation. Such a disposition, when manifested, cannot fail to render the relations existing between employer and employee more agreeable, and perhaps more profitable, and this in all cases of employer and employee.

"To the same effect are the cases of Cooper v. McClun, 16 Ill. 435; Bliss v. Smith, 78 id. 359; Hoffman v. Fitzwilliam & Sons, 81 id. 521."

IV.

A garnishee execution should be deemed a new proceeding, requiring notice to all parties whose rights will be affected, not only from the nature of this proceeding itself, but also from its analogy to similar proceedings for like purpose.

It is recognized that an ordinary execution against property is a remedial process, following entry of judgment as matter of course, and not requiring notice to the judgment debtor. The

return of an ordinary execution against property unsatisfied is presumptive evidence that the judgment debtor has no property exempt from execution, and this remedial process is therefore at an end.

Legal procedure and practice in most jurisdictions provide one or more forms of special proceedings to supplement the process of ordinary execution above referred to. Such special proceedings differ materially from the ordinary execution. They are usually instituted by making new application to the courts for some form of relief, and sooner or later require notice to the judgment debtor.

In the State of New York, there are at least two distinct remedies of this nature, to wit, the judgment creditor's action and proceedings supplementary to execution. In the former, the debtor of course *has notice* by required service upon him of the summons, whether with or without a bill of complaint, and he again has opportunity to have his day in court; in the latter, upon order of the court *served upon him personally* he may be required to appear before a referee appointed by the order at a specified time and place and to answer as to his property. If property is discovered, a receiver may be appointed, but *only upon notice* to the judgment debtor.

Each of these seems to be recognized as a *new* and *independent proceeding requiring notice.*

By analogy, a garnishee execution should beyond question be deemed a new proceeding requiring notice.

The judgment creditor's action and proceedings supplementary to execution have long been part of the legal procedure of the State of New York. The conditions which precede either are the same as those which precede the issuance of a garnishee execution, and the latter should be interpreted and construed in the light of the two first named.

> "The policy of the state, as evidenced by prior acts is material in the exposition of statutes. (*Behn v. People,* 17 N. Y., 516; *in re N. Y. etc., R. Co.,* 193 N. Y., 72; *Zeigler v. Corwin,* 12 App. Div., 60). It is assumed that the legislature will not abolish a long standing policy without using explicit words to show its intention. (*In re N. Y. etc., R. Co.,* 193 N. Y., 72.) Hence, where a contrary intention does not appear, that construction will be given a statute which accords with prior legislative policy on the same question. (*Washington Cemetery v. Prospect Park, etc., R. Co.,* 7 Hun, 655 aff'd. 68 N. Y., 591)."
>
> Vol. 1, McKinney's Consolidated Laws of New York, Sec. 97.

1. Judgment-creditor's actions in New York.

Judgment-creditor's actions, so-called, were authorized and the procedure thereunder regulated by Sections 1871 to 1879, inclusive, of the New York Code of Civil Procedure. Most of these sections unchanged, and the rest of them with the substance unchanged, were incorporated in the New York Civil Practice Act as Sections 1189 to 1196, inclusive, and are grouped under Article 72 thereof under the title of "Actions By Judgment Creditors."

A Judgment-creditor's action, as defined by these sections, can be maintained only after an execution against the property of the judgment-debtor has been issued out of a court of record and has been returned wholly or partly unsatisfied.

Code of Civil Procedure, Sec. 1871.

Civil Practice Act, Sec. 1189.

In such actions the final judgment may provide for the satisfaction of the sum due to the plaintiff

> "out of any money, thing in action or other personal property belonging to or due to the judgment-debtor or held in trust for him which is discovered in the action; whether the same might or might not have been originally taken by virtue of an execution" (*Code of Civil Procedure, Sec.* 1873; *Civil Practice Act,* 1191).

except, however, that it expressly forbids the seizure of, or other interference with

> "any property which is expressly exempted by law from levy and sale by virtue of execution * * * *or the earnings of the judgment-debtor for his personal services rendered within sixty days next before the commencement of the action, where it is made to appear by his oath or otherwise that those earnings are necessary for use of a family wholly or partly supported by his labor*" (Italics ours). (*Code of Civil Procedure, Sec.* 1879; *Civil Practice Act, Sec.* 1196).

2. Proceedings supplementary to execution in New York.

Proceedings supplementary to execution were authorized and procedure thereunder regulated by Sections 2432 to 2471, inclusive, of the New York Code of Civil Procedure. Most of these sections unchanged, and the rest of them with the substance unchanged, were incorporated in the New York Civil Practice Act as Sections 773 to 813, inclusive.

Proceedings supplementary to execution can be maintained only after execution against property of the judgment-debtor has been issued.

Code of Civil Procedure, Sec. 2432.

Civil Practice Act, Sec. 773.

The proceeding is not usually undertaken until after the return of an execution unsatisfied.

As in judgment-creditor's actions, there is the express provision forbidding the seizure of, or other interference with property exempt by law from levy and sale by virtue of an execution and also

> *"earnings of a judgment-debtor for his personal services, rendered within sixty days, next before the institution of the special proceeding; when it is made to appear by his oath or otherwise, that those earnings are necessary for use of a family wholly or partly supported by his labor."*

3. Similarities and dissimilarities of the three remedies.

A. As to conditions precedent.

Procedure which must be taken before the creditor can take advantage of the special remedy is the same in all three, *viz:* Entry of judgment, issuance of execution against property, return of execution wholly or partly unsatisfied, or inability to realize under ordinary execution.

B. As to extent of exemptions in the case of householders.

The law for garnishee executions purports to authorize the taking of one-tenth of the wages and earnings of an employee in the hands of an em-

ployer at the time of the service of the execution, wheras, in both the judgment-creditor's action and in proceedings supplementary to execution, the earnings of the judgment-debtor for personal services rendered within sixty days before commencement of action or the proceedings cannot be reached, if it is made to appear by oath or otherwise, that those earnings are necessary for use of a family wholly or partly supported by his labor.

C. As to notice to judgment-debtor.

Application for an order for a garnishee execution, or for a garnishee execution can be made *without notice* to the judgment-debtor.

In the commencement of a judgment-creditor's action, summons must necessarily be served upon the judgment-debtor; he has an opportunity to defend, an opportunity to show that he has a family which needs his earnings for its support, and upon entry of judgment he or his attorney would be entitled to notice thereof.

In proceedings supplementary to execution, proceedings are begun by service of a notice and copy of the order upon the judgment-debtor. He is given an opportunity to state what property he has and whether he has a family dependent upon him for support. If property is discovered and a receiver is to be appointed, he is entitled to two days' notice of application for appointment of such receiver, which must be served upon him personally,—service upon his attorney being insufficient.

On the contrary, in proceedings for procuring the issuance and service of a garnishee execution, it is expressly stated that the application may be

made "without notice to the judgment debtor"; there is no opportunity for him to appear and explain that his entire wages are needed for use of his family, and even if there were an opportunity, no discretionary power is vested in the judge, justice or court to whom the application is made, and he *must issue* the order or the execution directing the delivery of one-tenth of the judgment-debtors' wages to the officer serving the execution.

Is there any reason why the proceeding for issuance of a garnishee execution is not a new proceeding requiring notice to the debtor, in the same sense that a judgment creditor's action is a new action, and supplementary proceedings is a new or special proceeding, for both of which notice in every step is required?

Why, in a garnishee execution proceeding, should a penniless debtor be deprived of opportunity of showing that his earnings in the future as they shall accrue are all needed for the future support of his family, when in supplementary proceedings and in a judgment creditor's action he not only has the right to have notice and to appear but on showing its necessity for the future wants of his family, can retain his entire earnings for sixty days prior to the commencement of the action or proceeding.

The judgment of the Supreme Court of the State of New York should be reversed with costs.

Respectfully submitted,

MAURICE E. PAGE,
Attorney for Plaintiff in Error.

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WM. R. STANSBU
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BRIEF OF DEFENDANT IN ERROR

Supreme Court of the United States.

October Term, 1924

No. 64

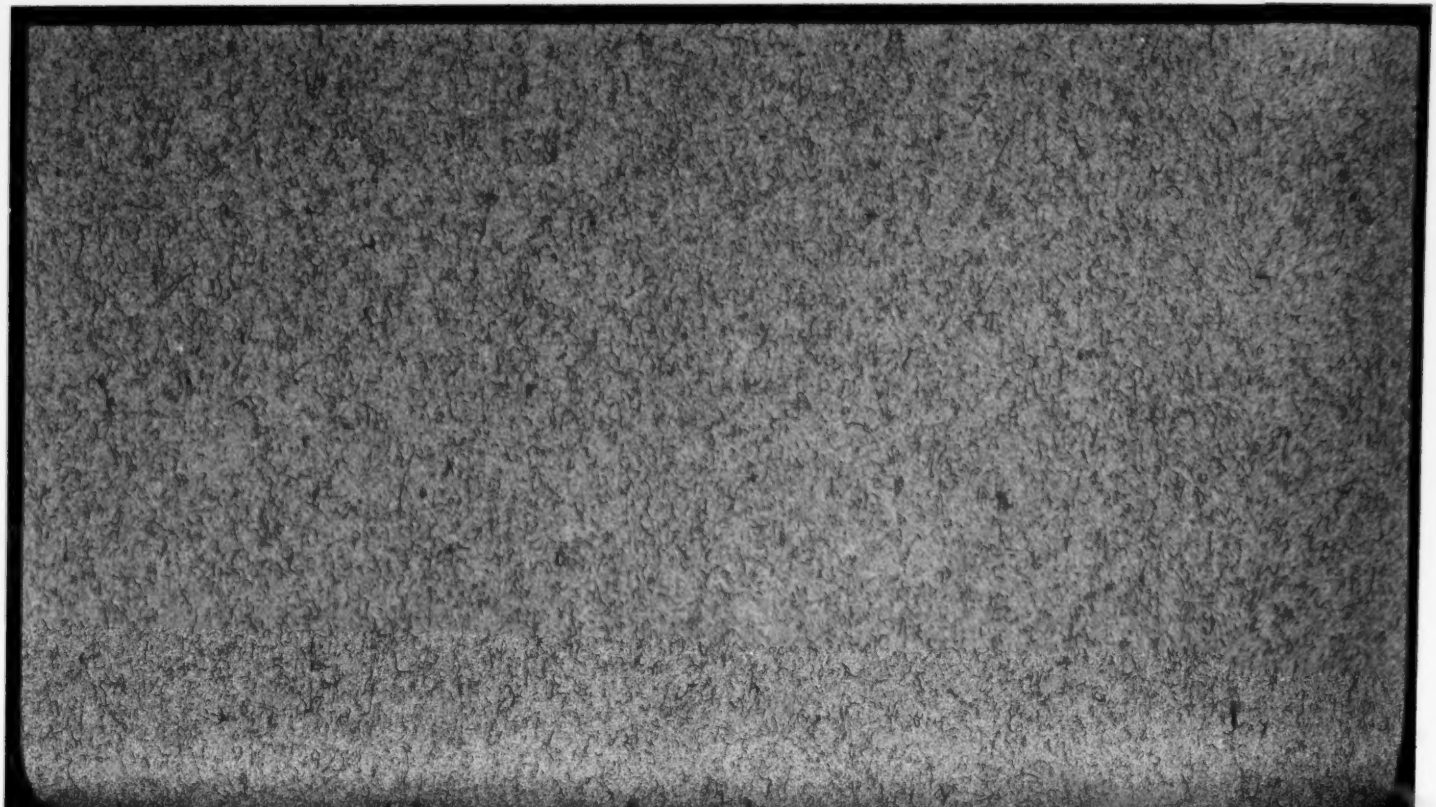
MIDICOTT JOHNSON CORPORATION
Plaintiff in Error

vs

~~ENCYCLOPEDIA PRESS, INC.~~ William W. Smith
Defendant in Error

In Error to the Supreme Court of the State of New York

MOE GOLDSTEIN, Attorney for Defendant in Error



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SUPREME COURT OF THE UNITED STATES

ENDICOTT-JOHNSON CORPORATION
Plaintiff in Error
vs.
WILLIAM H. SMITH,
Defendant in Error

DEFENDANT'S BRIEF

STATEMENT OF FACTS

This action was brought to recover the sum of $97.87 from plaintiff in error upon three judgments previously obtained against three certain judgment debtors, all of whom were then in the employ of the plaintiff in error. The action is brought under former Section 1391 of the Code of Civil Procedure of the State of New York which is now known as Section 684 of the Civil Practice Act of said state to compel the plaintiff in error to pay the aforesaid aggregate sum of the three judgments for the reason that the plaintiff in error failed to pay as directed by an order of the Supreme Court of the State of New York, after an order was obtained pursuant to said Section.

Defendant interposed an answer cheifly upon two grounds, to wit:

(a) That the aforsaid act authorizing the is-

suance of the execution was unconstitutional and void.

(b) The law in question is contrary to public policy and void.

The acton came on for trial and defendant in error obtained judgment against the plaintiff in error with an opinion reported in 189 N. Y. Supp. page 673, and which judgment was appealed from by the plaintiff in error and which was unanimously affirmed by the Appellate Division, Third Department of the State of New York. Reported in 199 Appellate Division page 194; and again plaintiff in error appealed from said decision to the Court of Appeals of the State of New York and again said judgment was unanimously affirmed without an opinion reported in 234 N. Y. page 628. We therefore find that three times the question involved upon this appeal have been passed upon by different courts in the State of New York.

POINT I

Section 1391 of the Code of Civil Procedure is Constitutional and has been so declared.

See opinion of Mr. Justice McCann, page 44 of the Record. Opinion of Justice VanKirk, page 51 of the Record.

Laird v Carton 196 N. Y. 169
Brearley School v Ward 201 N. Y. 358.

Plaintiff in error cites the case of Trapp v Brown 91 N. J. Law 481, affirmed 93 N. Y. J. 171

to the contrary on pages 23, 24 and 25 of its brief.

The New Jersey case is nearly similar to the New York Statute, but it differs in this respect, as follows:

> "Either party may apply at any time to the Court from whom such execution shall issue, or to any judge or justice isuing the same, or to the County Judge of the county, and in any county where there is no county judge, to any justice of the city court upon such notice to the other party as such county judge of justice shall direct for a modification of such execution, and upon such a hearing the said court, judge or justice may make such modification of such execution as shall be deemed just, and such exception as was modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided." Code 1391.

The above quotation not being in the New Jersey Statute does not prevent the debtor to vacate the execution which was done on motion in the New Jersey case.

The New Jersey case however, does not directly hold that the New Jersey Statute is unconstitutional, the court simply refers or intermates that it may be but does not directly pass upon the question for the reason that was not the question involved as the opinion shows.

POINT II

Every Presumption is in Favor of the Constitutionality of an Enactment of the Legislature.

The courts have repeatedly held that it is the duty of the court when an act and constitution can be so construed as to enable the act to stand, to give that construction that it will permit it to stand.

Fort v Cummins 90 Hun. 481 (N. Y.)
Sweet v City of Syracuse 129 N. Y. 316
In re Fuller 62 A. D. 428 (N. Y.)
People v Angle 109 N. Y. 567.

The invalidity of the act must be conclusively established before it can be held to be unconstitutional, and the unconstitutionality must be established beyond a reasonable doubt.

It is also the duty of the court to construe the act as to save the statute from constitutional infirmity.

Knight Templar Indemnity Company v Jarman 187 U. S. 197.
United States v D. & H. Co. 213 U. S. 407
Harriman v Interstate Commerce Commission 211 U. S. 401

Any statute valid as to apparent purport and intent must be construed and administered in the life of reason.

Standard Oil Company v United States
221 U. S. 1

It follows that, as Mr. Justice McKenna has well said,

> "if it be granted that the Legislative judgment be disreputable or crude it is notwithstanding not subject to judicial review. We have said many times that the crudities or even the injustice of the state laws are not redressed by the Fourteenth Amendment."

Chicago Dock Co. v Frailey 229 U. S. 680-686-687.

It would be well to examine the object of the law to determine this question fairly. The scheme of the statute is to regulate the collection of debts, and to enforce them, and that the primary object or purpose of the statute is for the protection of the judgment creditors, and the welfare of the public merchant in any community, and such enactments are not unconstitutional which are within the power of the Legislature for that purpose.

Wagner v Hagan 52 A. D. 387 affirmed
165 N. Y. 607
Fougera & Co. v City of New York 224
N. Y. 269.

Where doubt exists whether a statute is unconstitutional, the statue prevails.

People v Crane 214 N. Y. 154

Every presumption is in favor of validity of legislative acts, unless there is a substantial departure from organic law.

Ellis v City of Rochester, 219 N. Y. 427
People v Briggs 50 N. Y. 553
People v City Prison 144 N. Y. 529
Robert Dollar Co. v Canadian Car Co., 220 N. Y. 270; 225 N. Y. 84.

Courts cannot decide a case in accordance with its individual views of public policy upon ethical principals, without support in Constitution, statute or judicial decisions.

U. S. Title Guaranty Co. vs Brown 217 N. Y. 628.

The Workmen,s Compensation Law of 1914 was held not to deprive employers of their property without due process of law and such enactment by the Legislature was declared valid.

Southern Pacific Co., vs Jenson 244 U. S. 205.

It is not for the court to pass on the wisdom of a statute.

Gautier vs Ditmar 204 N. Y. 20.

It has been repeatedly held in the State of New York that the public policy of the state when the Legislature acts is what the Legislature says, that it shall be, is not void as against public policy.

Demerest v Fleck 128 N. Y. 208
Lancaster v Amsterdam Company 140 N. Y. 576.

Public policy should not defeat the enforcement of a Legislative contract.

Brock v Trevelers Insurance Company 88 Conn. 308
Ford v Stevens Motor Company 203 Mo. App. 669
Tinline v Whitecross Insurance Company 151 L. T. Journal 434

When we consider the constitutional aspects of a statute, I assume that we mean to consider what view the courts will take of its validity under the Constitution of the United States and of the several states. Let us begin, accordingly, with an attempt to formulate a correct theory of the substance of a fundamental constitutional right. How far will the courts protect a person in carrying out his own wishes and compelling others to respect such wishes, irrespective of the wishes of the state expressed by legislative power?

Whe we come to the question how far should the courts protect individuals from legislation we find on the one hand not a few who would read the inhibitions contained in the Constitution of the United States as if they constituted a complete body of rules of definite and unchanging application rather than, broadly speaking, a statement of generalities declaring a policy. These might recall as they criticise as new and dangerous in-

novations the liberalizing tendency of some of the recent decisions to uphold legislative power, that even the famous Dartmouth College case (4 Wheaton, 518), decided in 1819, was limited in 1837— and not for the worse—by the decision in the Charles River Bridge case (11 Pet., 420), and that its most important practical sequence was the refusal of the states to permit the grant of irrepealable and unamenable corporate charters. The latter decision was thought by contemporaneous jurists such as Kent, Story and Webster so to impair the sacredness of contracts under the constitution and the security and value of legislative franchises as to write the epitaph of constitutional liberty, but constitutional liberty, as it is understood by its present adherents, still lives, although corporate charters are neither as exclusive or inviolate as their possessors might wish them to be. The leading case is now like a small tombstone on a high hill—one sees it from all directions, but when one comes up to it there is nothing to it.

On the other hand we find those who, impatient of constitutional limitations, have often pronounced the doom of judicial judgment when laws have been declared invalid, although such decisions have not perceptibly nor permanently affected the fundamental rights of self-government.

Government is a practical institution, not a matter of opinion and theory (Milwaukee Publishing Co. v Burleson, 255 U. S., 407).

In New York, decisions of the courts are in con-

flict with the legislative policy, holding that the state could not regulate the rate of wages and the hours of work of employees of municipal contractors (People ex rel. Rodgers v Coler, 166 N. Y. 1), that thereafter the workmen's compensation laws were contrary to the constitutional limitations of due process and equal protection of the laws because they imposed liability without fault (Ives v So. Buffalo R.R., 201 N. Y., 271).

The above two latter cases were speedily followed by amendments to the state constitution (N. Y. Constitution, Article 12, Section 1, Article 1 Section 19) giving to the Legislature the power which the state courts refused to recognize. Each of these laws was later approved in principal by the Supreme Court of the United States (Atkin v Kansas, 191 U. S. 207; New York Central RR. v White, 234 U. S., 188).

The same result we have as to the statute in the case in question, the words, "without notice" was amended by the Legislature by inserting those words therein after several judicial opinions making it necessary therefore.

The Supreme Court of the United States recognizes the wisdom of the "strong presumption that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds."

Middleton v Texas P. & L. Co., 249 U. S.

152, 157).

Yet, as was recently said by Mr. Justice Homes in discussing the Scranton "cave-in" statutes in Pennsylvania Coal Co. v Mahon 43 Sup. Court, 158;

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. * * * The greatest weight is given the judgment of the legislature, but it always is open to interested parties to contend that he Legislature has gone beyond its constitutional power."

It has been held that the Legislature may properly protect creditors.

People v Beakes Dairy Company 222 N. Y. 416

Payne v Kansas 248 U. S. 112

POINNT III

The appeal herein should be dismissed, because the unconstitutionality of the statute was not raised upon the trial.

In order to give this court jurisdition under

Section 709 Revised Statute to review the judgment of a state court, the Federal question must be distinctly raised in state court, and a claim which amounts no more than a vague and inferential suggestion that a right under the constitution of the United States has been denied is not sufficient.

See Thomas v State of Iowa 209 U. S. 258
N. Y. Central R. R. v N. Y. 186 U. S. 186
Zadig v Baldwin 166 U. S. 485

This court will notice the defendant's answer (pages 9 to 16) sets up the defence that the statute in question is unconstitutional; at the trial plaintiff proved a prima facie case (Lutkins vs Lutkins, 216 N. Y., 708) and rested (page 280) then defendant stated to the court as follows: (page 284)

"We move for a dismissal of the complaint and for a nonsuit and judgment for no cause of action; upon the ground it does not state facts sufficient to make a cause of action, and there is not sufficient evidence to support the respective causes of action alleged in the complaint, or any cause of action, and we also ask for a dismissal of the complaint for all the reasons set forth in the objections to the various exhibits as they have been presented."

"The Court: Decision reserved."

"Mr. Page: We have no further proof. We rest evidence closed" (page 285).

Defendant therefore offered no evidence and his motions for dismissal were all indefinite, and did not move to dismiss, upon the ground that the statute in question was unconstitutional, or upon the other grounds set up in its defenses; the record is entirely barren, therefore this court cannot pass upon the question, as was held in

Dodge vs Cornelius, 168 N. Y. 242.

"Unless the unconstitutionality of a statute be raised on the trial in some manner a party is deemed to have waived his rights to claim it unconstitutional."

Which case has been followed in

People vs Ostrander, 144 A. D. 860.

Can defendant claim that by raising the question by pleading, has the same effect? Why no, no more so than in any other action, wherein a defense or counter claim is set up in the answer, makes it evidence without proof.

Therefore, as this court has held, that where a cause can be decided without passing on a constitutional question; such question will not be considered, should follow in this case. See

Peoples ex rel Simpson vs Wells, 181 N. Y. 252.
McCann v City of Albany, 158 N. Y. 634.
Martin v Home Bank, 160 N. Y. 190.

POINT IV

The question of the unconstitutionality of the statute can only be raised by judgment debtors, and not by appellant, and therefore appeal should be dismissed, also as debtor himself must raise exemption rights as allowed by law and defendant cannot for the first time upon appeal raise this question for debtor's benefit, because he is not a party to this suit and not interested in its result.

It has been held that the constitutional inhibition against taking property without due process of law is for the sole benefit of the owners of the property, and cannot be taken advantage of by one not interested. See

People vs Turner, 117 N. Y., 227
Ives vs South Buffalo Railway Co. 201 N. Y., 271

The 10% of debtor's wages required to be deduced by defendant, was not defendant's property but debtors, therefore how can it complain.

Wood v Dock Co. 193 A. D. page 243 court said:

"Prior to the adoption of this legislation no lien could be acquired upon the future earnings of a judgment debtor either by the commencement of a judgment creditor's action or the institution of supplementtry proceedings. Prior to the adoption of this legis-

lation the earnings of a judgment debtor for his personal services rendered within sixty days next before the institution of supplementary proceedings or the commencement of a creditor's suit could not be reached where it was made to appear by his oath or otherwise that those earnings were necessary for the use of a family wholly or partly supported by his labor. (Code Civ. Proc. Sections 1879, 2463). Under the new legislation a garnishee execution becomes a lien and a continuing levy upon the earnings due or to become due to a judgment debtor, if such earnings amount to twelve dollars or more per week, to the extent specified in such garnishee execution, which will not exceed ten per cent of such earnings."

A debtor has no constitutional exemption, and whatever claim he has by way of exemption is a statutory exemption, and the Legislature has the absolute right to limit or modify such exemptions. What the Legislature did was to allow a sixty day exemption of wages to all debtors if such debtor claimed the same under his oath and not otherwise; and then modified that exemption under Section 1391 of the Code by allowing the debtor 90% of his present and future earnings during the 60 day period and the remaining 10% to be garnisheed by a judgment creditor. This clearly was the intention of the Legislature when it wisely made the amendment to Section 1391 or enacted the so-called garnishee law, and if it was otherwise then the enactment would be a nullity.

Debtor is not a party to this action nor brought in as an interpleader, and therefore not interested in its result, and the defendant cannot claim any exemption for debtor as allowed by law, because there is no evidence claiming any exemption in this record, and further debtor alone can raise any exemption allowed him by law, and then only under his oath, and where it does not appear by debtor's oath, that certain earnings were necessary for the use of his family, they are not exempt, which is the case at bar. Debtors were all called as witnesses upon the trial of this action and made no such claim for exemption. See

Seeley v Connors 109 A. D. 279 (N. Y.)
Moss v Lightfine 60 Misc. 62 (N. Y.)
Wilcox v Howe 59 Hun 268 (N. Y.)
Gilewicz v Goldberg 69 A. D. 438 (N. Y.)
Shull v King 24 A. D. 605 (N. Y.)

And the failure to raise such exemption debtor waives his constitutional right.

Embury v Connor 3 N. Y. 511
Fiero v Reynolds 20 Barb. 275
Townsend v Norris 7 Hun 239
Howe Co. v Howe Ass'n 34 Supp 848
People v Adrogna 124 Supp 68
Hurley v Allban Co. 129 Supp 14

The act does not impair any contractural or property right.

Bayliss v Ryan 64 Misc 146 (N. Y.)
Holbren v Goldberg 175 Supp 474

Appellant contends that debtor or defendant should be notified as to the application for the garnishee execution, or receive notice of its application, with this contention respondent does not agree. There is nothing directly stated in Section 1391 of the Code that notice of the application should be given to the person against whom the execution is issued, but on the contrary, the code provision was amended in 1905 by providing that the application could be made "without notice to the judgment debtor," and the court has held in Pistchal v Durant 168 A. D. 100 on page 102 "Section 1391 of the Code of Civil Procedure, as now amended, dispenses with the necessity of notice to the debtor, but not to the trustee." The relation between the employer and his employee, the judgment debtor, is hardly a fiduciary one. It is a simple case of debtor and creditor. The moment the week ends, in the absence of any special condition or claim, the week's salary belongs to the employee, and it is merely a clerical act for the employer to deduct the amount garnisheed.

It is true there is no "fault" on the employer's part, but that is not the quesion. The employer is faced with an order which is ample protection to him in making payments out of his employee's salary. Bloomingdale v Richardson (supra). The appellant claims that it receives no extra nompensation for employing clerica lforce to take care of 16,000 employees if all their salaries were garnisheed, and therefor would be a "burden" to it. So far as the "burden" is concerned, a subsequent provision of the same Section 1391 of the Code contemplates the necessity for an application by

"either party" to modify the order. The Code itself provides, whatever burden there may be. There are inevitable "burdens" incident commercial life in general. The making of the application on notice to the employer might be a "burden" to it. Without passing upon the question of the wisdom of notice to the employer, the question presented is controlled solely by the language of the statute. The Code contemplates ex parte applications. As Laughlin, J. said in Ellis v Chapman, 165 A. D. 79, at page 83.

> "The section expressly provides that no notice of the application need be given to the judgment debtor, and it does not expressly require notice even to the trustee; but this court has held that the trustee is entitled to notice."

It has not held that notice to the emloyer is necessary. The words used in the statute are plain and unambiguous. There is no room for interpretation, for there is nothing to be interpreted. The meaning of the statute is plainly expressed in all of its terms. To inject into the Code a provision neither expressed nor apparently intended would be judicial legislation, and not interpretation,

> People ex rel Savings Bank vButler 147 N. Y. 164

To broaden the scope of the section is for the Legislature. It is not for the court to say that, when the Legislature made no provision for notice to the employer such notice is necessary.

The relationship of employer and employee is not involved in any respect.

Pistchal v Durant 153 Supp 735 Aff'd 216 N. Y. 644
In re Edsall 165 Supp 967, Third Dept.
Kackel v Serviss 189 A. D. 54 (167 Supp 348) Third Dept.
In re Siegel 166 Supp 177
Holbren v Goldberg 175 Supp 474
Lutkins v Lutkins 216 N. Y. 708

Appellant cannot claim that it is being subject to inconvenience under the law, as it has a very simple and inexpensive method to rid itself of that peril, in that, upon the immediate receipt of such garnishee execution to discharge the debtor, but it desires to retain him and at the same time to retain the garnishee execution and make no objection to it, until sued for its refusal to honor and obey the mandates of the court, and then comes into court and asks to be relieved of the situation. By appellant following such practice it simply takes its 16,000 employees under its wings and protects them as against their creditors, which means in substance, as follows: Now, Mr. Workman, if you will come and work for me and be one of our 16,000 employees, you can safely deal and make purchases of credit from the local merchant and you need not pay for that which you may purchase, for the reason that our company (meaning appellant) does not honor and obey the Court mandates, regarding the garnishee of wages, and that nothing will be taken out of and from your weekly earnings or wages; thereby, by this method

and protection you can have a steady job and you can obtain all the credit you desire and need not pay your honest and just debts, and if you are sued and judgments obtained against you, we will not honor the courts mandate and protect your earnings and wages. Are the courts going to sanction such practice, and allow debtors to abuse their credit? Why should it not be compelled to honor the court's mandate and pay the garnishee executions as well as the City of New York, which had on file in the office of the city paymaster up to March, 1915 approximately 2700 garnishee executions, as pointed by the court in its opinion of the case of People ex rel Seweller v Prendergast, 89 Misc. 584 (153 Supp. 699).

The property subjected to execution is not that of the defendant, but that of the debtor, i. e. a debt due him from his employer; so that the execution and levy substitutes the officer making it, as the person entitled to collect the pay.

POINT V

Debtor is not entitled to notice of the application for the garnishee execution.

It should be borne in mind that the statute is simply a remedy by which the judgment creditors may enforce their judgments which they have previously obtained against the debtors.

Having this in mind the first stage in instituting an action, a summons is duly served in accordance with the laws of this state by delivering the same to and leaving it personally with the defendant

in the action and a written complaint may of may not be attached to the summons, if the defendant in that action refuses to appear, judgment could be taken by the plaintiff proving the same before a competent court, or if a duly verified complaint was served with the summons the plaintiff may enter judgment without formal proof. Here we have so far the service of the summons upon the defendant, by personally receiving the same. This is followed up by the entry of a judment which the defendant has notice of its entry. He has then the right to appeal from the judgment, vacate or set it aside within the time allowed by law. Up to this point the respective debtors in the case at bar have failed to do and they have knowledge of the fact that a judgment has been obtained against them. The judgment in itself does not necessarily stop a judgment creditor's remedy to enforce it, the judgment is simply an adjudication of the facts complained of in that action of the plaintiff against the defendant, and which must be necessarily true if the defendant fails to appear or appeal or modify said judgment.

A judgment is of no value to a judgment creditor unless collectable; therefore in the wisdom of the New York State Legislature it has enacted an act known as Section 1391 of the Code of Civil Procedure giving a judgment creditor an additional remedy to follow up and collect their judgments; but before the so-called garnishee execution can issue against the wages of the debtor which is one of the methods provided by law and is the method followed by the defendant in error in this case, defendant in error was obliged to

and must issue a so-called property execution which is Section 1362 of the Code of Civil Procedure now known as Section 636 of the Civil Practice Act. That section provides that an execution shall issue upon judgment to the sheriff of the county to levy upon any personal property found within his county, in order to satisfy said judgment. This so called property execution is absolutely necessary before a garnishee execution shall issue, which fact is so stated in said Section 1391 of the Code of Civil Procedure.

A property execution is issued by the attorney for the judgment creditor **without notice** of any kind to the judgment debtor and in the event the sheriff finds property belonging to the judgment debtor he can immediately sieze the property **without notice** to the judgment debtor and expose the same for sale and sell the judgment debtor's property at a certain time and place **without notice** to the judgment debtor; but it is usual that the sheriff notifies of the time and place of sale so that he may have an opportunity to redeem the property. In the event said property execution is returned unsatisfied the statute distinctly provides that an execution against the wages or earnings of the judgment debtor may be applied for without notice; upon the theory that the debtor is well aware of the fact that he is indebted to his creditor and it is presumed that he knows the law in that the judgment creditor will make all endeavors to collect what he is justly entitled to.

Therefore the judgment debtor is harmless by the issuance of said garnishee execution without notice, he can move to vacate, set aside or move the same as well as his employer as provided for in said Section but neither of them including the plaintiff in error has vacated said objection, and have waived their rights, but such notice is unnecessary as they are not deprived of any property belonging to them unlawfully.

The law of the State of New York also affords them a remedy by way of appeal Section 1347 of the Code provides for such an appeal when the order mentioned was granted by the Supreme Court; and Section 1348 of the Code authorizing an appeal when the order was granted by the justice thereof and in case the order was made by an inferior court, or by a judge thereof the appeal is authorized by Section 1342.

The Court of Appeals in Laird v Carton (Supra) discussing the question says at page 171 as follows:

> "An execution is a remedy, it is a remedial process."

The court held that it is enough that a judgment "has been recovered," when the execution is sought to be issued and again the court says,

> "TO THIS THERE IS NO CONSTITUTIONAL OBJECTION."

It has been held that notice of application for

garnishee execution need not be given to the judgment debtor's employer, that since payment of such an execution discharges his indebtedness it is wholly immaterial to whom he makes payment matter of Siegel 179 A. D. 582.

Bloomingsdale v Richardson 140 A. D. 350.

The right of judicial review partly statutory in its nature partly rests upon a constitutional basis of due process. Mr. Justic Clarke said in Kowch Jan Fat White 253 U. S. 454 at page 457 on the question of a claim of a child of Chinese parents to the statis of the American citizen by birth, "it is fully settled that the decision by the Secretary of Labor as such a question as we have here is final and conclusive upon the ground unless it is shown that the proceedings were manifestly unfair, were such as to provide fair investigation or show manifest abuse of the community to the executive officers by the statute, or that there either was not fairly exercise with the fundamental primitive of justice, embraced within the conception of due process of law." The plaintiff in error does not raise any contention that manifestly unfairness abuse has been practiced by the sheriff who executed the executions in accordance with the statute in order to come within the law as cited in the above case.

In Lisner v Taplitz 86 A. D. 1 affirmed 177 N. Y. 559, it was held that the order for the examination of the judgment debtor will be made upon affidavit to the satisfaction of the Judge issuing

the same, that he is satisfied with the contents thereof and that that order cannot collaterally be attacked and gives the court jurisdiction to make the same.

If this statute is held to be unconstitutional then the laboring man without money, can certainly appeal to the rich for credit as no sane merchant will ever take any risks of receiving payment for merchandise sold, altho this statute is a letter of credit to the laboring man without money that holds a good position.

The principle involved in the case at bar, is the same as a writ of attachment, that is, when a levy is made no notice is given to defendant, but he may subsequently come in and have it vacated.

POINT VI

The writ of error should therefore be dismissed with costs.

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